

103
**PRIVATE SECTOR COMMENTS ON CONGRESSIONAL
PROCUREMENT REFORM PROPOSALS AND HOW
THEY WILL AFFECT SMALL BUSINESS**

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Private Sector Comments on Congress...

HEARING

BEFORE THE

**SUBCOMMITTEE ON PROCUREMENT, TAXATION, AND
TOURISM**

OF THE

**COMMITTEE ON SMALL BUSINESS
HOUSE OF REPRESENTATIVES**

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

WASHINGTON, DC, FEBRUARY 2, 1994

Printed for the use of the Committee on Small Business

Serial No. 103-65



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PRIVATE SECTOR COMMENTS ON CONGRESSIONAL PROCUREMENT REFORM PROPOSALS AND HOW THEY WILL AFFECT SMALL BUSINESS

WEDNESDAY, FEBRUARY 2, 1994

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON PROCUREMENT,
TAXATION, AND TOURISM,
COMMITTEE ON SMALL BUSINESS,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:03 a.m., in room 2359-A, Rayburn House Office Building, Hon. James H. Bilbray (chairman of the subcommittee), presiding.

Chairman BILBRAY. The subcommittee will come to order.

Today the subcommittee continues 2 days of unprecedented hearings to gage the effect of procurement reform proposals that are currently before the United States Congress.

Yesterday we received testimony from administrative witnesses representing the Office of Federal Procurement Policy, the Department of Defense and the Small Business Administration. Today we will be receiving testimony from a diverse group of individuals representing the small business, minority and private industry communities. Their testimony today will serve to complete for the benefit of those who will be drafting the final house procurement reform package what thoughts and suggestions the private sector has with regards to Federal procurement reform.

As we discussed yesterday, the proposals currently before the Congress along with the ideas previously expressed by both the Section 800 Report and the National Performance Review, call for the creation of a system that will not only create a streamlined and efficient Government purchasing environment, but will also create a fundamental shift in the small business government purchasing environment. Proposals to increase the small purchase threshold and to create a commercial buying environment will dramatically change the small business environment.

It is estimated that over 80 percent of the Federal contract actions happen under \$100,000. The dramatic changes that increasing the small purchase threshold from \$25,000 to \$100,000 will create, requires us to carefully protect the access of information to small businesses. It is to this end that this subcommittee has been a very strong advocate of the creation of an electronic commerce system and has advocated linking the increase in the purchase threshold to the creation of an electronic commerce system.

In addition, all of the current proposals call for a move to a commercial purchasing environment which will allow the Government to take advantage of commercial competitive forces, but will make it easier for sellers to sell off-the-shelf material to the Federal Government. Although it will certainly be a benefit for the Government to move to a commercial environment as opposed to the current cumbersome environment, it is essential that as we move in this direction we do not remove the current small business opportunities that we have sought for so long to create.

As small business representatives of America's business interests, it is imperative that we receive your thoughts on the current proposals. This Congress is committed to submit to the President, acquisition reform legislation this spring. However, your thoughts will help make sure that in our haste to reform we do not make it more difficult for small businesses and in the private sector to contract with the Government.

We appreciate all of you coming in today and we look forward to your testimony.

[Chairman Bilbray's statement may be found in the appendix.]

Mr. Baker?

Mr. BAKER. Thank you, Mr. Chairman. I compliment you on your willingness to conduct these hearings and to inquire as to the methodologies that might be effected to enhance opportunities for small business. I certainly support your effort and have my own thoughts as to the current problems in the marketplace. It seems that small business initiatives have somewhat been lost in the shuffle, that in many smaller communities today which have the good fortune to be in close proximity to a major Federal installation find that small businessmen in that community have a difficult time in getting access to procurement and professional service contracts.

It's not always simply another small businessman who is competing with them, it perhaps is a national organization in scope. The bidding requirements may present a bonding prohibition. There are a lot of structural reasons why small business enterprises may not successfully compete. I strongly support your initiative in reviewing and, hopefully, reforming the process to insure that more taxpayer dollars are spent with small businesses which are the economic backbone of the country. I appreciate your activities.

Chairman BILBRAY. Thank you.

Also, I have a letter here from a Mr. James Himonas, who is chairman of the Government Affairs Committee, Electrical—National Electrical Manufacturers Association Lighting Controls Council. We would like to have that put, without objection, into the record, his comments on this hearing.

[Mr. Himonas' statement may be found in the appendix.]

Chairman BILBRAY. We would also like to point out we have nine witnesses today. We really must conclude by noon because of other commitments I have and I know other members of this committee have. So we would like to urge everyone to try to keep their testimony to 5 minutes. We will insert your entire written testimony in the hearing record. But if you could limit your testimony to 5 minutes so we have time to ask questions and hear the next panel, we would appreciate it.

I know sometimes that is tempting to read your entire statement. But if you could summarize it for us and try to limit it to 5 minutes we would appreciate it because we have nine witnesses to get through and we have questions and answers.

So at this time we would like to announce that our panelists today are E. Colette Nelson from the Small Business Legislative Council; Harriet Michel from the National Minority Supplier Development Council; Paul Seidman, Independent Defense Contractors Association; Victoria Bondoc—I hope that is right—from the U.S. Chamber of Commerce and Gemini Industries; and Ervin Torrez, Latin American Management Association.

We will start with Ms. Nelson.

**TESTIMONY OF E. COLETTE NELSON, EXECUTIVE DIRECTOR,
AMERICAN SUBCONTRACTORS ASSOCIATION, ON BEHALF
OF THE SMALL BUSINESS LEGISLATIVE COUNCIL**

Ms. NELSON. Thank you, Mr. Chairman. You can be sure that I won't read the 40 pages of testimony that we submitted.

Chairman BILBRAY. God bless you.

Ms. NELSON. I do want to point out that one of SBLC's key goals is to assure that small businesses are able to participate in the Federal marketplace. We can't help but be concerned when we hear President Clinton talk about how important small businesses are to the future of this country and then see his representatives develop an intricate cobweb of proposals designed to lock those small businesses out of the Government market.

The rhetoric yesterday at the hearing from OFPP Administrator Dr. Kelman and other representatives of the administration were very pretty. But at least my mother always told me that actions speak louder than words.

Despite what you heard yesterday, we believe that at least the administration's proposals not only do but are designed to lock small businesses, and particularly small disadvantaged businesses out of the Government marketplace.

Let me emphasize that we support procurement reform. But we believe that acquisition streamlining must benefit the seller as well as the buyer. Everything we see to date represents a strong buyer bias.

I want to address particularly two issues. My written testimony addresses a myriad of issues. But I want to address two issues this morning. One, obviously, and the one perhaps with the most profound and immediate impact is the proposal by the administration to raise the small purchase threshold without simultaneously implementing electronic contracting. This leaves 98 percent of the contract business opportunities cloaked in a shield that we won't be able to get through—a shield that the developers of the Stealth would love to have.

Now, let's make clear that what we have a fight over here today is about advance notice to contractors and about sufficient time to advance an offer. Failing to give adequate notice to contractors, or failing to give them an adequate time to respond renders meaningless the term "open competition." If you don't know until the last minute what the buyer wants, and if you don't have enough time

to put together an offer, all the promises that every eligible offeror is allowed to bid is an empty promise.

When Congress raised the threshold the last time Congress put in wording that allowed small businesses to have 10 days to see a notice and respond. These are the posting requirements. Secretary Preston waxed poetic yesterday talking about how the posting process works and how difficult it is for small business. She apparently forgot to tell you that the procurement bureaucracy has essentially instituted a regulatory repealer of that law anyway.

What they've done is to put in the FAR a provision that urges the contracting officers to use oral solicitations. If they use oral solicitations the posting requirement is waived.

We can't find this waiver in the law. I don't know where they found it. Maybe Congress wrote that waiver with special ink that we can't see, but it's not in the law.

Twelve associations representing small businesses and small disadvantaged businesses pointed out the inconsistency of this in a letter to OFPP in June. We talked about it before this subcommittee. You will remember us talking about it in June.

It took the administrator 5 months to even respond to that letter, 5 months. Is this putting people first? Is this reinventing Government? Five months to respond. Then it was merely a transmittal letter to the other members of the FAR council asking for their opinions.

Another 2 months have gone by; we have still not had any response. The fact is that this administration is proposing to roll back to the pre-1984 unbridled discretion where the contracting officers can call three people, two of whom they know can't do the job, and the one person that they know that they've decided they want to award the contract to, and there will be no record and there's nothing that we can do about it.

They say that \$100,000 contracting opportunities are too burdensome to pay a lot of attention to. Let me tell you, your constituents and my members spend an awful lot of time earning \$100,000; not 1 or 2 years, usually more. I think they are going to be real upset to hear that thousands of purchases at \$100,000 a pop just aren't meaningful for the Government to pay attention to and monitor. These proposals are going to cause these contract opportunities are going to disappear from the screen.

The other issue that I want to address this morning is subcontracting plans. As you know, none of the bills under consideration would eliminate subcontracting plans, but the administration, at least in its meeting with the small business community, has made it clear that it is their objective to eliminate subcontracting plans for commercial items. The members of the Acquisition Reform Grouping Working Group propose to add commercial services. That means all services because services by their very nature are commercial.

If you eliminate subcontracting plans for commercial items and commercial services you have essentially repealed the requirement of 95-507. The wording will still be in place but they will not be implemented on the great majority of contracts.

We find a certain incongruity between the testimony of the Acquisition Reform Working Group and the willingness of their large

members to provide generous offsets when they're selling to foreign countries. They're willing to furnish a country buying a major system with a promise that major components will be manufactured in this country. The fact is that those companies seem to have no problems seeking to outbid each other when exporting American manufacturing jobs. But they don't seem willing to comply with the requirements of 95-507, which merely seeks to provide for the participation of American small businesses and American small disadvantaged business concerns.

Unfortunately, unlike the foreign offset, the subcontracting requirements are not tied to the very basic decision of who will receive the contract. In my opinion, if the administration really wants to harness the most effective incentive they will make small business participation and small disadvantaged participation an element of the contract award decision and do it before the fact, not after the fact. Because the problem with subcontracting plans is not that they operate as an inhibitor but that they are an afterthought to be gotten around after the contract is awarded.

I just want to give you one more example of the extremes to which the Acquisition Reform Working Group would seek to carry the Congress in its goal, in its striving for commercial buying practices. It proposes to waive virtually all restraints on business behavior which traditionally have been considered unacceptable.

They would waive the restriction on providing gratuities, that is, bribes to contracting officers. They would waive the restriction against hiring felons convicted of contract fraud. They would waive Buy America.

This may be appropriate in their corporate culture. But again, I think that the members of this committee and the members of the public and certainly the small businesses that I represent would not want to see these practices applied in U.S. procurement.

Again, just in summary, we strongly support procurement reform. But we don't think that procurement reform and streamlining should be done on the backs of small business. We don't want to be shut out of the market. We recognize, as Secretary Preston said yesterday, that the pie is shrinking. But we believe that the proposals on the table would not leave the pie proportional. Instead, other contractors, the large contractors would get a bigger proportion of the pie and we would slowly start to be cut out.

If we're wrong and if the Clinton administration is not supporting these proposals, then we'd like to see their very specific, their very precise proposals on how they intend to advance rather than retard the opportunities for small firms and small disadvantaged firms and women-owned businesses to become more prominent players in the Federal market rather than being shut out.

Thank you, Mr. Chairman.

[Ms. Nelson's statement may be found in the appendix.]

Chairman BILBRAY. Thank you, Ms. Nelson.

Ms. Michel.

TESTIMONY OF HARRIET R. MICHEL, NATIONAL MINORITY SUPPLIER DEVELOPMENT COUNCIL

Ms. MICHEL. Good morning, Mr. Chairman. My name is Harriet Michel.

Chairman BILBRAY. Yes, I pronounced it right the first time.

Ms. MICHEL. Well, the Congressman doesn't know how to pronounce his name, that's the problem. Congressman Michel is really spelled like my name.

In any event, I am the president of the National Minority Supplier Development Council, otherwise known as NMSDC. Our organization, more than 20 years old, includes 3,500 corporate members, including most of the Fortune 1000, and more than 15,000 certified minority businesses, Black, Hispanic, Asian, and Native American. The services of our council are delivered through 42 affiliated councils around the country.

Our organization was founded by corporations with financial assistance from the Department of Commerce to provide increased procurement and business opportunity for minority businesses of all sizes.

I want to thank the Congressman Bilbray for the invitation to provide the perspective and findings of NMSDC during your deliberations on an issue of critical importance to minority businesses and to the American economy as a whole. Let me also publicly thank you, Congressman Bilbray, for the support and assistance your office has provided the Nevada Minority Purchasing Council as it works to strengthen its program and reaffiliate with NMSDC. We look forward to that happening.

My time is short so I'm asking that this testimony be accepted for the record. I would like to summarize and highlight our major concerns.

As you look at the merits of subcontracting goals, the acquisition threshold and the definition of commercial products, we ask that you consider the impact of your decisions on the minority business community. According to the Bureau of Census there are 1.5 million minority businesses in America, making them one of the fastest growing and most dynamic sectors of business in the country.

More than 25 percent of American citizens are members of minority groups, that is, African-American, Hispanic, Asian, Native American. These are people who pay the dollars that go to buy the Government goods and services.

But minority businesses account for only 9 percent of all U.S. businesses and 4 percent of gross receipts. Purchases from minority businesses represent only 1 to 2 percent of total annual corporate purchases. America's major corporations are working with us to bring those numbers up. We have seen some significant growth with some corporations.

In 1972, when NMSDC was founded our corporate members reported approximately \$86 million of goods and services from minority businesses. In 1992, our corporate members reported \$20.5 billion. These procurement successes were accomplished not by lowering purchasing standards but by sourcing quality minority firms and giving them business on a competitive basis, businesses—business which would have been placed somewhere anyway.

Minority businesses do not need more studies, advice, training, or counseling, they need real opportunities to do real business: Contracts and subcontracts. Loss of subcontracting opportunities with the Federal Government represents a potential disaster for the minority business community. This is not only because of the

potential failure of many small minority businesses, which are the anchors of minority communities, but also, and equally as important, it represents a potential loss of jobs.

Minority suppliers are also minority employers. The hire and extremely high proportion of minorities. Indeed, the benefits to the country's minority communities that pass directly through minority entrepreneurs come from hiring minorities as well as purchasing from other minority-owned businesses when they can.

Small Business Administration data shows that more than 70 percent of job creation by small businesses occurs after 4 years of operation. According to the Bureau of Labor Statistics from 1990 to the year 2005, the labor force is expected to grow by 26 million people. Of these, 27.8 percent will be Hispanic, 15.8 percent will be African-American, and 10.1 percent will be Asian. Many of NMSDC's certified businesses are well positioned to contribute both to job growth and to the overall economic health of minority communities and the country as a whole.

There are still many barriers to the full participation of minority businesses in the American economy. While our organization acknowledges that there are many Government initiatives at the local, State and Federal level, much more remains to be done to assure access to information, fairness and openness in the Government procurement process.

Therefore, NMSDC recommends, one, the standardization of terms and definitions of eligibility. Currently each agency and department has its own definition of minority, small disadvantaged, historically utilized, under-utilized rather, and so on. This creates enormous problems both in the public and private sector when we are trying to build out programs. It creates unnecessary competition among members of small disadvantaged groups because we continue to fight over who is and who is not included.

We also recommend the Federal Government-wide program on small and disadvantaged business. The initiatives of DOD and NASA, for example, could also be replicated in nondefense departments and agencies.

We also urge abolishment of self-certification. Front companies compete unfairly with legitimate minority businesses when credentials are not checked to determine that businesses are at least 51 percent owned and operated by minorities.

Finally, we recommend that enforcement of regulations impacting on the offices of small disadvantaged business utilization as described in Public Law 95-507. In many cases, the OSDBU director reports directly to the procurement office—contracts office when they are required to—that they are required to monitor. According to regulations, the OSDBU director would report directly to the Secretary.

We think there should be a codification of OSDBU operations which would allow for objective monitoring and evaluation of efforts.

We think that there should be a credible, efficient mechanism for providing access to working capital for minority businesses. When the first study on minority businesses was done in the 1940's, the biggest barrier to their success was a lack of access to capital. Today, sadly, it is still the same issue. Half of the minority busi-

ness owners who have been turned down for credit by commercial banks believe that racism was one reason for the bank's decision.

We've submitted the survey where they expressed that opinion.

The Community Reinvestment Act, CRA, is not working with regard to providing more loans to minority businesses.

NMSDC strongly opposes the elimination of subcontracting goals. Two articles in "The Washington Post" last week underscored the need to hold contractors to a reasonable standard on including minority-owned businesses as subcontractors. On January 27, an article described an agreement to examine the past performance of contractors, including the management of subcontractors, applying for new or expanded contracts for more than \$200 billion flowing through the Federal procurement system.

On the following day an article appeared regarding how Federal agencies devise elaborate practices of circumventing Federal laws so hundreds of millions of dollars in Government business could go to favored companies.

Finally, no major contractor has had their contract terminated because of lack of compliance with the subcontracting provision nor paid liquidated damages.

We also find that the definition of commercial products is far too broad. A broadened definition will enable more minority—more, many more companies to become exempt from Government requirements like subcontracting plans.

NMSDC conditionally supports raising the small purchase threshold to \$100,000. But we would support this action only if there is an electronic notification system in place to ensure small and disadvantaged businesses have immediate and equal access to these procurement opportunities.

In closing, I want to say that the economic playing field is surely not level yet. Minority businesses must be factored in and utilized if America in fact, is going to compete successfully in the global marketplace. I have included as part of my testimony a reprint from "Fortune" magazine on minority business and a survey of NMSDC's minority businesses prepared in 1993 by Yankelovich Partners.

I want to thank you and the committee for the opportunity to testify. I want to go back, Congressman, to your earlier statement and to something that Ms. Nelson said. We certainly do not oppose reform of the procurement process but it must not, must not be borne by small businesses and surely not by minority and disadvantaged businesses.

Thank you very much.

[Ms. Michel's statement may be found in the appendix.]

Chairman BILBRAY. Thank you very much.

Mr. Seidman.

TESTIMONY OF PAUL J. SEIDMAN, INDEPENDENT DEFENSE CONTRACTORS ASSOCIATION

Mr. SEIDMAN. I am appearing today on behalf of the Independent Defense Contractors Association. IDCA represents domestic small businesses that supply replacement parts for DOD weapon systems. Since competition was mandated by Congress in 1984 legislative reforms, small businesses manufacturers have provided DOD

with high quality spare parts at a fraction of the prices previously paid to the OEM's.

Mr. Chairman, the often-overlooked fact is that these small businesses are our domestic manufacturing capability. The so-called "original equipment manufacturers" for the most part are assemblers, dealers or importers rather than manufacturers. The OEM's purchase parts manufactured by others and assemble them into weapon systems or resell them as replacement parts.

Until recently the OEM's purchased the parts from domestic small business manufacturers. As recognized by Congressman Klink yesterday, they are now purchasing these parts abroad. This trend has negative implications for both our economy and our ability to surge production in time of crisis.

IDCA's comments concerning the various legislative provisions are as follows: S. 1587 would require regulations to set forth circumstances under which a contracting officer could withhold authorization and consent to use a patent in the performance of a Government contract. If authorization and consent are withheld, an OEM could sue a competitor they allege is using their patent in the performance of a Government contract.

This provision is both unnecessary and highly anticompetitive.

Under present law, a patent holder is entitled to recover just compensation from the Government if its patent is used in the performance of a Government contract. The patent holder cannot sue the competing contractor. The Government can shift the cost of patent infringement to the competing contractor by patent indemnification clauses.

Permitting an OEM to sue a competitor is highly anticompetitive. Small business simply will not bid if faced with the possibility of defending patent infringement suits. By making even a spurious threat of patent infringement suit, an OEM could eliminate competition and assure itself of lucrative noncompetitive awards at the expense of both the taxpayer and small business manufacturers.

In an attempt to regain spares business lost to more efficient small business manufacturers, the OEM's have also been lobbying to amend legislative proposals to treat more unpatented technical data as proprietary.

IDCA commends SBA's Bob Moffitt for his statement yesterday. What Mr. Moffitt said, is that taxpayers should own the data that they pay for, whether it's charged to them as a direct or an indirect expense.

The Congress should follow SBA's lead and resist efforts to tack on a technical data provision to these legislative reforms. The 807 committee and the OEM technical data initiatives are a disguised effort to obtain Government protection from the rigors of competition. The OEM's have not been as subtle when alone with friends in the Government. This is clear from a confidential Value Added Study prepared by Pratt & Whitney and some Air Force buyers at Tinker Air Force Base.

The confidential study states as follows, and I quote:

"The DOD Spare Parts Breakout Program has been highly successful, so much so that growing concerns have developed about taking breakout too far. When we talk about breaking out fracture critical parts and we begin to receive feedback from our prime con-

tractors that they may not be able to support our efforts in the future, it is time to assess our priorities from a realistic standpoint."

What this study recognizes and, they felt it was confidential, is what the OEM's need to compete against more efficient small business manufacturers is 8(a) type set-asides. It's not politically astute for them to request that, so instead they said protect our rights in data so that we can—to encourage dual use technology in the purchase of commercial products. What they don't say is what they're defining as "their" rights data, is data paid for by the taxpayer if it's charged to the taxpayer as an indirect rather than a direct expense. In other words, "what's mine is mine and what's yours is mine."

We are also concerned that a preference for purchasing commercial items would override the Competition in Contracting Act and justify noncompetitive procurements where competition could be achieved by using Government specifications.

Commercial products are not a panacea. Whether commercial products best satisfy the Government's needs should be determined on a case by case basis.

We would therefore recommend, consistent with the recommendations of the Section 800 panel, to permit companies manufacturing products to Government specifications to compete on equal footing with those offering commercial products.

We also urge the committee to resist those who would expand the laws from which commercial products are exempted to include the Buy American Act and Small Business subcontracting.

If these protections are eliminated, OEM's will accelerate their efforts to have work performed abroad.

In sum, the Section 800 panel recommendations reflect the absence of input from small business manufacturers that constitute our domestic manufacturing capability. If a proposed legislation implementing the Section 800 panel recommendation is enacted in its present form, it will result in increased costs, a loss of U.S. jobs and manufacturing capability.

Thank you very much.

[Mr. Seidman's statement may be found in the appendix.]

Chairman BILBRAY. Thank you.

Ms. Bondoc.

TESTIMONY OF VICTORIA BONDOC, GEMINI INDUSTRIES FOR THE U.S. CHAMBER OF COMMERCE

Ms. BONDOC. Thank you. Good morning.

Mr. Chairman, members of the committee, I am Victoria Bondoc, testifying on behalf of the U.S. Chamber of Commerce. You went through the first time and it was perfect.

Chairman BILBRAY. At least I think I can get Torrez right.

Ms. BONDOC. The Chamber represents more than 220,000 businesses, local and State Chambers of Commerce, and trade and professional associations.

I am the president and CEO of Gemini Industries, a small defense contracting company that I started in 1986. My company provides technical and management consulting services to the Department of Defense, Department of Transportation, and a variety of other Government agencies as well as private industry.

The company has grown over the past 8 years to over 100 employees in Massachusetts, New York and Northern Virginia. Because we specialize in helping organizations initiate and manage change, I am particularly pleased to be a spokesperson for the Chamber on the Government's efforts to reinvent itself and to change the Federal procurement system.

The chamber has identified a number of key areas of procurement reform that are of particular interest to our small business members. These target facilitating small business ability to satisfy Government requirements, maximizing contracting opportunities for small businesses and minimizing the financial risk to be assumed by the small business.

The chamber supports the proposal to create a new simplified acquisition threshold which would set the small business reserve at \$100,000. To ensure that small businesses continue to receive adequate notice of small business contracting opportunities the chamber supports language which retains the Commerce Business Daily threshold at \$25,000 for contracting activities that do not provide electronic notice to industry, \$50,000 for contracting activities that have implemented basic electronic bulletin board capabilities, and \$100,000 for contracting activities that implemented full EDI capabilities.

We also strongly advocate the full implementation of current laws requiring posting and other procedures to encourage small business participation under the threshold.

Work also needs to be done in the area of debriefing. Debriefing should be mandatory and should provide meaningful information relating to why a company did not win a contract.

The chamber supports the provisions in H.R. 3586 and in the two other bills requiring regulations and set criteria for the entitlement to a debriefing, requiring debriefings very soon after the date of award, and require that the debriefings address the strengths and weaknesses of the offeror's proposal in greater detail.

Another area of great concern to small business are the prompt payment rules. On occasion, payments to Gemini from the Government have been delayed for up to 6 months. These kinds of payment problems are common for small businesses and need to be addressed in either this legislation or in a separate bill.

The chamber also strongly supports provisions in H.R. 3586 and in the other two bills that would set the dollar threshold for providing cost and pricing data at \$500,000. This would help contractors of all sizes cut down on the labor hours required to provide the data and would also be a meaningful paperwork reduction measure.

The chamber supports provisions in both H.R. 3586 and the Senate bill 1587, recommending that agencies be able to contract directly with 8(a) companies, unless the company requests that the award be made through the Small Business Administration. But there needs to be continued technical support to the 8(a) firm to ensure that minority business upon graduation can continue to thrive as an organization.

SBA should use the resources previously involved in the contracting process to continue to support the development of the 8(a) firm

as an organization that will soon have to compete on the open marketplace.

The SBA 8(a) Program is a good program. With the assistance of the program Gemini, like other minority businesses, continue to grow.

I would also like to address the issue of commercial products. The chamber has long believed that good public policy necessitates greater use by the Government of commercial products. This will help the Government reduce its acquisition costs and will also help to integrate the defense and commercial markets. However, the chamber was not able to sign onto the Acquisition Reform Working Group's specific legislative proposal exempting subcontracting requirements, which concerns many of our small business members.

Finally, the chamber strongly advocates making the changes proposed in the procurement reform bills Government-wide, so that contractors will not have to deal with different procurement systems and rules for different agencies within the Government.

We look forward to working with you over the coming months to secure comprehensive improvements for the Federal Government's acquisition system.

Thank you.

[Ms. Bondoc's statement may be found in the appendix.]

Chairman BILBRAY. Thank you very much.

Mr. Torrez.

TESTIMONY OF ERVIN TORREZ, LATIN AMERICAN MANAGEMENT ASSOCIATION

Mr. TORREZ. Thank you very much. Members, Chairman, Mr. Chairman and the members of the Small Business Procurement, Taxation, and Tourism Subcommittee for this opportunity to present testimony before you today.

I am Ervin Torrez, president and chief executive officer of Computer Resource Management, Inc., an Hispanic small and disadvantaged business, and vice chairman of the Latin American Management Association, hereinafter referred to as LAMA. LAMA is the national trade association which serves the Hispanic Community by promoting the interests of the Hispanic business community and opening new markets for Hispanic business in both the public and private sectors.

LAMA will focus its limited comments on S. 1587. LAMA is deeply concerned about rumored changes that the administration would like made to certain provisions in S. 1587 which would take small and minority business participation in the Federal acquisition system back 20 years. Among these rumored changes that concern LAMA are: First, the de-linking of simplified acquisition threshold and an electronic data interchange requirements and second, a broadening of the already broad definition of "commercial products."

Unlike the provisions of H.R. 2238, LAMA believes that one of the serious shortcomings of S. 1587 is the lack of an electronic data interchange statutory requirement in the streamlined simplified acquisition system. Despite the intent of the Executive Branch with the maximum discretion in establishing and designing such a system, LAMA remains unconvinced that collaborative efforts by the

agencies will be completed in an effective and efficient manner. Small and minority businesses thereby will suffer the consequences through lost opportunities.

The rumored administration amendment to S. 1587 to eliminate subcontracting requirements for commercial items poses several threats to small and disadvantaged businesses. Any proposed inclusion of Section 800 Panel's proposal to free suppliers of commercial items from subcontracting requirements in S. 1587 raises doubts as to the Government's stated commitment to small and small disadvantaged business contained in Section 8(d) of the Small Business Act, that is, "It is the policy of the United States that small business concerns, and small business concerns owned and controlled by socially and economically disadvantaged individuals, shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency."

The Government prime contractor community has long advocated the elimination of current subcontracting plan requirements, under the rubric that such requirements impede the effective and efficient operations of their businesses. It is ironic then that, in the true commercial items arena, unquestionably, as mentioned before, commercial businesses, such as IBM, Kodak, and General Motors, have been successful in operating under small and disadvantaged subcontracting plans, integrating these businesses into their supplier base and even winning awards for their high levels of small and small disadvantaged business participation. The Government prime contractor community is not willing to make the effort to integrate small businesses and especially small disadvantaged businesses into their subcontractor and supplier base. The Section 800 Panel and an amended S. 1587 would validate their actions.

Any elimination of subcontracting requirements for commercial items poses another serious problem for small and small disadvantaged businesses when coupled with contract bundling—the consolidation of purchases into even larger and more diverse procurement opportunities. With little hope of winning such large and diverse solicitations, the small and small disadvantaged business community is pushed further out of the Government marketplace.

In efforts to ameliorate this elimination from one side of the Government market, procuring agencies have directed small businesses and small disadvantaged businesses to the subcontracting market, due in large part to the subcontracting requirements. With the subcontracting door now being inched closed, the small and small disadvantaged business community will once again be confronted with lost opportunities, lost employee jobs and lost growth potential.

Last, LAMA is concerned about the extremely broad definition of "commercial products" contained in S. 1587 and the reports we have continued to hear of the administration's efforts to expand that definition. Of particular concern to LAMA is the inclusion of some services within the definition of commercial products. Installation services, maintenance services and repair services, currently in S. 1587, S. 1587's definition of commercial products, generally might be construed to be associated with the acquisition of commercial products. The inclusion of training services and other services if such services are produced for support of a commercial item are not. S. 1587's definition of commercial products is already too

broad and limitation rather than broadening the definition is called for. LAMA would suggest, as an alternative, examination of OFPP Letter 80-5 for a practical and workable definition of commercial products.

Thank you, Mr. Chairman, once again for the opportunity to present our views on S. 1587. I would be pleased to answer any of your questions.

[Mr. Torrez's statement may be found in the appendix.]

Chairman BILBRAY. Thank you. As I stated earlier, all of your testimony will be put into the record in its entirety. I believe there was at least one exhibit that was requested to be put in. If there's no objection we will put that into the record also.

WHAT EXHIBIT?? WHO SUBMITTED IT??

Chairman BILBRAY. Yesterday's testimony—I know some of you were here to hear that testimony—pointed out the fact that the President has issued an order that by January 1, 1997, I believe it is, that the EDI system will be put in. But from the testimony of the witnesses yesterday, to reach that goal is highly unlikely.

What they did state was the fact that they could have in effect, probably a lot earlier than that is an electronic notebook which would actually publish what's out there and what kind of contracts are being solicited.

Is there any comment from any of the panel on a timetable? What we are looking at is trying to force a timetable that at least the electronic notebook would be in effect, by a certain date and then a complete EDI system if possible would be in by another date. How does that fit in to your overall?

Ms. NELSON. Mr. Chairman, I think that both your bill and the Conyers-Clinger bill address that by providing the ultimate incentive for establishing the first electronic notice system at \$50,000—to raise the threshold to \$50,000 and then full electronic contracting to raise the threshold to \$100,000.

Chairman BILBRAY. I understand that. But what we were—in dealing with the administration on this and the agencies, they are resisting that language should be say dramatically.

Ms. NELSON. Mr. Chairman, I understand how dramatically they are resisting that language. But let me reemphasize again that without those in place, raising the threshold will force to disappear from the screen hundreds of thousands of contract actions that may be reserved for small businesses but if we don't know they're out there we can't make an offer, we can't bid. The administration is over-eager to raise that threshold.

If they're so eager, maybe they'll speed up the implementation of the electronic bulletin board and the electronic contracting as proposed in your legislation. I think you've got to provide the carrot or it's not going to be done.

Even the President's letter, by January 1987 they're only going to cover appropriate contracts. What's appropriate, Mr. Chairman? They're only going to have some. Well, what's some? We need pre-

cise, concise language from the administration and all we're getting is pretty words.

Chairman BILBRAY. All right.

Ms. MICHEL. I think, also, Mr. Chairman, that you do need these intervening steps. I'm a board member of something called the Center for Advance Purchasing Studies which is in Arizona that looks at purchasing practices of major corporations. Has done a study recently on the implementation of EDI among the America's corporations. Believe it or not, it is far less utilized than the common wisdom suggests.

It is not that easy. There are some industries, obviously, that are fully automated. But the vast majority of them are using EDI systems far less than is suggested. To assume that the Federal Government could have all of its contracts on an EDI system even by 1997, so it seems to me that there has to be some provision for intervening steps so there is formal notification.

I think 1997 is probably unrealistic to assume that the Government can do that.

Mr. SEIDMAN. Mr. Chairman, we feel you can't rely on the bureaucracy to implement that without the carrot. Let me give an example. In 1982 the Congress enacted the Commerce Business Daily provision which required actual notice be synopsized in "Commerce Business Daily" before a solicitation went out. What the rule-makers did, they came out with a provision which said that presumed notice was sufficient. By presumed notice, a certain number of days after you send off your synopsis to the "Commerce Business Daily" in Chicago you can presume it's been synopsized.

That was challenged at GAO and it was held, that the provision did not meet congressional intent.

So what they come back with next, believe it or not, is a provision stating they can presume something has been synopsized unless someone comes back, some small business comes back and tells them that it hasn't been synopsized. Unless you come up with some sort of carrot you're going to see the same thing again.

Chairman BILBRAY. Any other comments? Mr. Torrez?

Mr. TORREZ. Mr. Chairman, I would just say from a businessman's point of view, I'm not an expert in the current state of electronic data interchange. However, I can say this, that our small business was able to get onto bulletin boards with a very, very small investment as soon as it became advantageous for us to do so.

I believe that in procurement reform there are two major issues. One, is that of the advertising the solicitations. The other one, of course, is the rest of the procurement being done through EDI. I believe that notification can be done almost immediately. I might be naive about that. But I believe that it can be done quickly.

Chairman BILBRAY. But the notification to me is the top priority.

Mr. TORREZ. Yes, sir.

Chairman BILBRAY. The second is the completion of the EDI. So what we have to get is the notification so people know.

I know I am concerned because in my district, like every district, we have the same thing where people just do not know about contracts until it is too late. When they see something done is the first time they realize that they could have maybe done it with the same

quality but cheaper but they did not know about it. I am concerned about it, as is this entire committee.

Mr. Baker?

Mr. BAKER. Thank you, Mr. Chairman.

Just a brief comment before I address my question, Ms. Nelson. I'm not picking on you, I just think you will give me a direct answer, although I am sure the rest will too.

There appear to be two basic issues, at least as I observe the problem: One is structural, the other is policy. From a structural perspective it is advisory information, it is electronic data transmission, it is OEM patent requirements, it is a number of elements that are within, frankly, bureaucratic ability to control or dictate if they presume to do so within existing parameters of law.

However, there is another element to this which has not been discussed, at least for my view, which is the policy question with regard to procurement and contracting services in small business. For those who operate within the DOD 1207 Program there is at least a small business provision as well as minority and women-owned set-asides. Outside DOD you don't find that small business language very commonly.

As difficult as it might be for some to believe this, for a majority-owned small business who is trying to get contracts from a Federal agency, it is much more difficult because they are not even a goal much less a target.

I think small business procurement legislative effort has gotten away from real small business. In my view, many definitions are available. Commonly it is 500 employees or less, \$5 million in gross revenues. In my State that is a big business.

I am suggesting, isn't there some logic for an altogether different policy approach that we do in fact, help small businesses become large, allow competition among small businesses, and not so much emphasis on women-owned, minority-owned, but more emphasis on small, and truly small, to allow small to become large?

The way I propose or suggest to hear your comments with regard to this is in the event, let's assume it is a military installation and they are going to spend \$8 million on procurement and professional services, that within a certain geographic radius of that facility, that X percent of that budget, we will determine what is appropriate, using your word, as to what level be spent on small businesses may be defined with a much narrower target on a competitive bid process as a result of electronic data or informational service programs. Would not that be an appropriate way to ensure that communities that host extensive Federal installations get some return of dollars to the community on a competitive bid basis?

Ms. NELSON. Well, let me first say that the Small Business Legislative Council doesn't have a position on that. I am happy to take it through their policymaking body. But let me give you an on the one-hand and on the other hand from my own perspective.

Mr. BAKER. I understand it is not a policy position. But I am asking your personal opinion.

Ms. NELSON. Right. From my perspective and even from most of the small business community's perspective the argument has always been that everybody who is a taxpayer and who is qualified

should be able to participate in the Government market to which their taxpayer money goes. So, that's on the one hand.

On the other hand it seems that perhaps an argument can be made that those local business taxpayers who are funding the infrastructure for that local Government, for that local base, making sure the schools are running, making sure the roads are there, making sure that they have utilities, that they are paying an extra tax to make sure that that local base is operating.

So, you may be able to make an argument that they are paying additional taxes and, therefore, perhaps should get an additional preference. I would point out that many States, and off the top of my head including Louisiana, have similar laws to that in their State public works.

Mr. BAKER. Right. But there is no provision with regard to Federal contracting.

Ms. NELSON. There is no provision now.

Mr. BAKER. There are two levels with regard to Federal contracting. One is direct Federal expenditure and the second is Federal contracting with a private industry, which is the major contractor. That's a second level of problem.

I am talking about direct Federal expenditures, not contracts.

Ms. NELSON. Yes, sir.

Ms. MICHEL. You did not solicit my opinion, Congress. But I will offer it anyway.

Mr. BAKER. I will be happy to hear it. Thank you, Ms. Michel.

Ms. MICHEL. That approach in my view would be—and I know you come from a State where you know how to pronounce that name—in my view that approach would be punitive to minority and women-owned businesses. Minority businesses most particularly because many Federal installations are located in places where there are no minority communities or very small minority communities.

That attitude, I'm often struggling with private corporations about that attitude, and that is, that minority businesses have to be up close and personal; you've got to smell them, see them, touch them, feel them, before you can do business with them. In fact, we are promoting minority business across the United States.

What should happen if in fact, there is not a local minority business capable of providing that service, does then, in an adjacent region or State or wherever, does that potential supplier get cut out of the action? I know you're not saying eliminating it altogether but perhaps give them some sort of preference. But that worries me because that happens all too often. What it does is it really forces some missing of contract opportunities because of the geographic preference.

Chairman BILBRAY. I think one thing we have to look at, in fact, with the EDI system or even the electronic notebook system comes in is that a lot of local people who have had a monopoly on contracts may find out that there is going to be competition from across the company. The locals should have the advantage of being there, not having the shipping costs and so forth, of being able to produce the product and knowing the economy. But in reality it is going to be a possibility that people in New York would end up with contracts in Alexandria, Louisiana, or in Las Vegas they may

have people from Los Angeles competing. But in reality that is happening anyway.

Mr. BAKER. I think, if I may, Mr. Chairman.

Chairman BILBRAY. Yes.

Mr. BAKER. I think the point is today in Alexandria the people are getting the contracts in New York and California and they are not getting them in Alexandria because you have to drive to the base, look at the billboard because it is posted, because there is no electronic transmission available. What small business with three people during a lunch hour is going to take one person and send them 14 miles over to the commissary to look at the billboard? Well, it does not happen.

What I am saying is if there—as the panelists have suggested for other reasons, carrots work, I'm suggesting mandates work. That at some point fair market competition is protected, that some reasonable allocation of resources be made for a community which provides resources for a Federal installation.

Of course, communities go after Federal installations hoping they will get them. But in the current environment where we are closing down military installations, they do not appear to be such a good deal anymore.

Chairman BILBRAY. Mr. Torrez?

Mr. TORREZ. Mr. Baker, just one small comment. I don't know whether it totally applies to your question. However, there is a provision for the local buy to be applied to that particular procurement that might support you.

Mr. BAKER. My experience has been that most procurement contracting agents, as in the case of a larger corporation dealing with a minority firm, a procurement officer in the Federal Government does not want to deal with a local firm because of all the hassles making sure the work will be done, the bonding concerns, cash-flow problems, wanting to have terms with the contract variance a little differently. So, it is a hassle. So, they just do not want to take a \$100,000 contract and afford the opportunity. They would rather bundle it into 10 \$100,000 contracts and have a national firm of reputation give the products.

What I am saying is that excludes competent small business owners from providing services that they are absolutely capable of providing.

Ms. NELSON. Well, and that certainly goes to another problem of the whole contract bundling issue which this subcommittee has already addressed. That's certainly happening, and it will continue to happen.

We saw a contract in Arizona where there was not a single large enough contractor in the State of Arizona to do the work. When they broke it into the subcontracts there were very few specialty trade contractors who were large enough to do the work. Almost all the prime subcontract and all the subcontract work was done by out-of-State contractors.

Let me point out that in my real life I represent the construction industry. At the subcontract level, very frequently on Federal work they simply will not bid if a large prime contractor comes in from out of State. They will walk away from the Federal work because they import such bad contract practices from other States. Particu-

larly, quite frankly, in States like yours where the construction community is fairly tight and fairly local, if you bring them from out of State, like California or New York, you import very different contracting practices. Local subs simply won't bid.

Mr. SEIDMAN. The problem also is that bundling under existing law is very, very difficult to attack. If an agency comes up with any sort of basis having any minimal rationality, bundling will be upheld by GAO or the courts.

Chairman BILBRAY. Well, I would like to thank you all for coming here today. We certainly made some great points that we will take into consideration for even modifications and amendments to this bill. I know Mr. Baker and I and the rest of the committee will work hard on this bill. I guarantee you, we will be a great advocate for the small businessman to be able to continue to function in this maze of bureaucracy.

We appreciate your coming here today and making your points because it sure countered a lot of points that were made yesterday by the administration.

Thank you.

Ms. NELSON. Thank you.

Mr. TORREZ. Thank you.

Chairman BILBRAY. If the next panel will come forward I would appreciate it.

[Pause.]

Chairman BILBRAY. The hearing will come back to order.

We now have our second panel of witnesses from the small business community consisting of four witnesses. Boy, I hope I got the first one right. Alan Chvotkin. If I can get that one I can—Weldon Latham, Anthony Robinson, and Amy Millman.

We will start with Mr. Chvotkin.

TESTIMONY OF ALAN CHVOTKIN, SUNDSTRAND CORP., FOR THE ACQUISITION REFORM WORKING GROUP

Mr. CHVOTKIN. Thank you, Mr. Chairman. Thank you for the invitation to testify before the subcommittee.

I am the corporate director of Government relations and senior counsel for Sundstrand Corp. I am pleased to testify on behalf of nine associations which have formed the Acquisition Reform Working Group. Together, we represent tens of thousands of companies and individuals, the overwhelming majority of which are small business.

We also have members of all sizes who refuse to do business with any Federal agency, in part because of the very acquisition laws which are the focus of your hearings and your legislation.

In today's environment of reduced budgets, particularly in defense, we can no longer afford the countless, nonvalue added requirements which burden the current system. These burdens limit the Government's buying power, limit the pool of potential suppliers, including small business suppliers, by deterring thousands of firms from doing business with the Government, and jeopardize the financial health of those firms who are willing to contract with the United States. The time is ripe to overhaul the present system and greatly streamline and simplify it.

We compliment you for taking the initiative to introduce your own reform proposal, applicable only to the Department of Defense. On balance, we believe you have introduced an excellent bill which, with selected amendments, could become a foundation for prompt House action on Government-wide procurement reform.

In addition, we have reviewed the November 1993 amendment offered by Congressmen Conyers and Clinger. This November proposal also is an excellent foundation for comprehensive reform. In fact, several of the provisions in your bill, Mr. Chairman, are identical to those in Conyers-Clinger, many of which we strongly support. Other provisions in your bill or in Conyers-Clinger need some modifications.

But more can be done legislatively and indeed must be done than the coverage in any of the versions of the legislation that we have reviewed. Obviously, some of our recommendations are more critical than others. Some will have a greater impact on the overall acquisition system than others. Yet, this should not be viewed as an invitation to enact piecemeal legislation. Time after time we have witnessed the fact the enactment of piecemeal legislation just doesn't work. Therefore, we urge you and other Members and committees of the Congress, and in the administration, to take those bold steps. The course of the Federal acquisition system into the 21st Century will be charted in this session of Congress.

Mr. Chairman, fundamental comprehensive reform of the current system will significantly increase the opportunities for small business. Let me highlight several areas in our detailed recommendations that will illustrate that point.

The first issue is commercial products. Mr. Chairman, I am convinced that commercial products reform will be the litmus test by which industry and the American public will judge the success of our overall effort at reinventing Federal acquisition.

Our detailed recommendations in commercial products fall into four broad areas. First is the scope of the definitions. While we have a number of technical suggestions which we understand are readily acceptable to you, of significance, we propose to move beyond the tangible products which are addressed by all of the legislative proposals and recommend you also include commercial services which are addressed in none of them.

Without coverage for this sector, an entire segment of the small business community risks being left at the station when the acquisition reform train starts rolling down the tracks. However, we recognize the importance of properly defining that universe of service activities that are to be included in the legislation. We believe we can make a start with your help.

The second area of concern goes to the heart of the issue of which Federal laws should apply to commercial procurement. Simply, the list of statutes included in the various legislative proposals to be specifically exempt from applying to commercial products must be significantly increased. The Section 800 panel recommended that 28 laws not apply to commercial products. Your bill has 9 of them.

Numerous Government studies have recognized that each one of these Government unique laws creates a barrier for commercial businesses seeking to do business with the Federal Government, even though a different analysis may be required to assess the im-

pack of firms who are prime contractors or who may be subcontractors.

Third, we are concerned that not enough consideration has been given to the impact of the flow-down of Government unique terms and conditions to suppliers or other business segments of the prime contractor. Here, too, the mandatory flow-down of Government unique terms and conditions prevents many small businesses from doing business as subcontractors to prime contractors.

Finally, we are concerned about retaining any post-award audit rights for the Federal Government. Clearly, the Government should obtain all of the information it needs in advance of the procurement in order to make a source selection evaluation. Many companies will readily provide the Government with extensive information in advance of the purchase request. Post-award auditing is virtually unheard of in the commercial marketplace. We strongly oppose the imposition of that requirement as provided for in several of the legislative proposals.

Mr. Chairman, your proposals and others would make the threshold for the Truth in Negotiations Act permanent at \$500,000. Under current law, the threshold for the Department of Defense would fall from the current \$500,000 to \$100,000 after December 31, 1995. Unfortunately, the civilian agencies continue to labor under the \$100,000 threshold.

We compliment you and Congressman Conyers and Clinger for making the level permanent in DOD at \$500,000 and agreeing to make the threshold applicable at \$500,000 for all of the civilian agencies.

Next, I want to mention several issues relating to the creation of the simplified acquisition threshold. Under your bill and the Conyers-Clinger proposal, establishing the simplified acquisition threshold at \$100,000 is directly and expressly linked to the Government's action in creating an electronic contracting system.

Mr. Chairman, notice to the small business community of contracting opportunities for awards below \$100,000 is absolutely essential. The Federal agencies should not be relieved of their present requirements to publish notice in the "Commerce Business Daily" of opportunities over \$25,000 and below \$100,000 until they do provide an alternative notice mechanism for those contracting opportunities. We support linking these two issues together.

Developing an electronic commerce system is also a worthwhile goal for the Federal agencies and for the business community. It is one of those elements that will move us into that contracting system for the 21st Century. We ought to do everything we can to facilitate its prompt development and its implementation. But I don't understand why it is necessary or appropriate to link the significant streamlining of the terms and conditions for contracting opportunities below \$100,000 to the administrative requirement of creating an alternative to the current CBD notification system. Small business in particular would benefit most by immediately establishing the simplified acquisition threshold at \$100,000, as long as they can be assured of receiving the notice of those contracting opportunities.

Coupled with immediately establishing the threshold is the obligation to greatly expand the list of Government unique Federal

laws that would not apply to purchases below that \$100,000 threshold. Again, according to the report of the Section 800 panel, 21 laws have statutory thresholds that apply to contracts below \$100,000. Your bill waives 3 of them.

The Section 800 panel recommended that nine laws continue to apply but not be implemented by a contract clause. Your bill includes three of these.

We can talk about simplification and the intent of opening up opportunities for small business below the threshold, but if the Congress is not willing to remove the very barriers to Federal contracting that each one of these statutes impose, you should not be surprised when the program fails to achieve the results you promise.

Mr. Chairman, our working group has proposed several additional recommendations for expanding small business participation in the Federal procurement system. We recommend that the so-called 1207 Program, available now only to the Department of Defense, be replicated for the civilian agencies.

We recommend that the DOD Mentor-Protege Program be made permanent and be appropriately tailored and made available to the civilian agencies.

We propose that the Government develop a long-range program planning and contracting forecast and make that available. This forecast should also include information on the extent to which past awards were reserved exclusively for small business.

We propose that the current comprehensive subcontracting plan test program at DOD be made permanent and broadly available as an alternative method for reporting small business subcontract awards.

We recommend Congress address the proper flow-down of the current laws to subcontracts.

Mr. Chairman, I would just like to highlight three of our detailed recommendations in the area of contract finance. We propose an alternative progress payment method. Here we recommend legislation that would encourage rather than inhibit an agency's flexibility in making progress payments.

We propose permitting forms of commercial financing mechanisms to be used where appropriate, particularly when purchasing commercial items.

Third, Congress should reform the contract closeout system. Contractors are financing the Federal Government with money properly due contractors but withheld by the agency during contract performance and not released until a final Government audit is completed. Yet, auditing of completed contracts is not a high Government priority.

Since the Government does not pay interest on contractor withheld funds or face any other penalty, there is simply no incentive on the agencies to expeditiously conduct these final audits or even make a partial release of funds.

There are a large number of other reforms that we have included in our detailed submission to the committee or addressed in our commentary on the various legislative proposals that should be incorporated in any meaningful acquisition reform legislation.

At the risk of missing important ones, I want to highlight just a few.

First, the area of contract claims and certifications can be addressed easily and should be incorporated into the legislation. We support raising the threshold for the mandatory certification of claims under the Contract Disputes Act from the current \$50,000 to \$100,000.

We recommend the creation of a uniform 6-year statute of limitation on claims applicable to both the Government and to the industries.

Congress should immediately repeal the 18-month time bar statute in 10 U.S.C. 2405, which is applicable only to the shipbuilding claims. This time bar has been inappropriately used procedurally by the Government to deny contractors meritorious claims that would otherwise be payable.

We are also continuing to explore other innovative yet meaningful proposals. One under discussion is the single agency audit concept that would require an agency to accept audit results from another agency.

Mr. Chairman, we are ready and willing to work with you and others in the Congress on the prompt enactment of meaningful, comprehensive acquisition reform that will benefit the Federal agencies, those large and small businesses alike who are already doing business with the Government, and the thousands of businesses who are kept out.

I would be pleased to answer any questions the subcommittee may have. Thank you.

[Mr. Chovtkin's statement may be found in the appendix.]

Chairman BILBRAY. I appreciate that. There are some excellent suggestions there that we certainly will take under consideration.

Mr. Robinson.

TESTIMONY OF ANTHONY ROBINSON, PRESIDENT, MINORITY BUSINESS ENTERPRISE LEGAL DEFENSE AND EDUCATION FUND

MR. ROBINSON. Good morning, Mr. Chairman and members of the committee. I am pleased that you have afforded voices from the minority business community the opportunity to appear before you today and to discuss our very deep concerns regarding legislation under the guise of procurement reform that is currently before Congress.

The Minority Business Enterprise Legal Defense and Education Fund is a national nonprofit public interest law firm and membership advocacy organization founded in 1980 by former U.S. Congressman Parren J. Mitchell for the purpose of providing legal defense and class interests—legal defense of the class interests of the minority business community.

MBELDEF considers integration of the marketplace to be the second phase of the civil rights struggle. Economic development of the minority community is essential to the equality of opportunity and justice in America. We have found that the creation and development of legally defensible MBE Programs for the benefit of racial minorities are effective in eradicating racial discrimination from the marketplace, from both the private and public sectors, in both the private and public sectors.

While it is inevitable that some form of procurement reform will be passed in Congress this year, I caution you to consider the effects on the small and particularly the minority business community.

A perfect example of this reform effort is embodied in S. 1587 being sponsored by Senators Glenn, Nunn, Bingaman, Levin, Bumpers and Leiberman, whose purpose is, "to revise and streamline the acquisition laws of the Federal Government and for other purposes." S. 1587 will dismantle the laws of this country to the point relative to minority business development where these minority businesses are no longer in existence and the economic fiber of this country will be in the hands of a privileged few.

What is especially disturbing about this proposed legislation is the fact that the Clinton administration is pulling out all stops to see its enactment. I can assure you that if S. 1587 is passed, the Congress will be hard pressed to explain how in the name of streamlining Federal acquisition processes they waived over 20 years of laws that facilitate the growth and development of small and minority businesses in this country.

This represents 20 years of legislation that allows for the maintenance of small and minority businesses into the marketplace, established by the Congress because in their wisdom they—in your wisdom they did not want to limit the capacity of this country to compete. Nor did they wish to place the well-being of this entire country in the hands of a privileged few. History is full of examples as to why this does work.

Since we were able to uncover this initiative, the small and minority business community has met with several representatives of the administration, including the Department of Defense, GSA, OFPP, SBA, and the President's Economic Council in an attempt to voice our concerns, only to be told that everything will stay as written.

If this legislation continues the amendments will reduce the number of days in which a contractor may request a debriefing and address other matters. MBELDEF especially has a vested interest in S. 1587 because it would practically void the Small Business Act which was authored and fought for by our chairman, former Congressman Mitchell.

What we consider to be the most heinous proposals in S. 1587 is the waiver of the requirement of subcontracting plans for vendors of commercial products. Commercial products are defined as anything that is sold currently or will, at some time in the future, be sold in the marketplace, like a jet aircraft. The waiver has been broadened so that it includes public utilities. Not only is the definition far reaching, it applies whether or not any public sales have actually been made.

The small and minority business community believe that this is an attempt by this administration, and proponents of this legislation, who consist of a majority of the large prime contractors in the Federal Government, to cast aside the social and economic programs with which they disagree.

The reasoning being given for these drastic waivers of law, "the statutes and implementing regulations create an obligation that is inconsistent with normal commercial practices." In other words, a

commercial vendor should not be required to alter the firm's accounting, purchasing, and contract administration practices in order to be able to market to the Government. They seem to suggest that a business in the commercial market can contract with whom it chooses and should not receive any direction from the Congress. Indeed, a business in the commercial market can also refuse to contract with another firm, just because it is a small business, or most especially because it is principally owned by a minority.

Once again, I will remind you that under S. 1587 a commercial item is anything currently sold or one which will, at some time in the future, be sold in the marketplace, whether or not any public sales actually are made. This would include anything from a pen to an aircraft. Again, this broad definition also includes public utilities.

The large prime contractor community has long advocated the elimination of the current requirement for the application and administration of subcontracting goal requirements with small and minority businesses on a contract by contract basis. While we in the small and minority community have strongly maintained the need to have contract by contract accountability so that a prime contractor's performance with respect to its subcontract goals can be scrutinized in the manner as other elements of contract performance. We have also advocated greater use of a prime contractor's past performance with respect to subcontract goals as an evaluation factor in the award of future contract business.

In addition, we have urged an application of liquidated damages for the failure of a prime contractor to faithfully discharge its subcontracting obligations.

The proposal to eliminate subcontracting plans poses a critical problem for the small and minority business community when one takes into consideration the reduction in the overall procurements of the Department of Defense and other Government agencies which has fueled the drive to consolidate purchases into even larger and more diverse solicitations. That has already been addressed by others.

If the opportunity to participate in the Federal marketplace is virtually eliminated for minority businesses, I dare say their very existence is threatened. To deprive any group of individuals the opportunity to establish an economic base, especially those groups who will be in the majority within the next decade, is the same as dooming this country to failure in the business arena in the future.

This is the reason why organizations such as MBELDEF must actively fight any attempts to dismantle the very fiber of their opportunity process.

In March 1993, MBELDEF scored a historic victory in the District of Columbia Court of Appeals on behalf of small and minority businesses. The Court ruled in this instance that PEPCO, a public utility here in the District of Columbia, had violated the Small Business Act by flatly refusing over a period of 12 years to submit subcontracting plans outlining how it planned to utilize minority- and women-owned businesses.

Mr. Chairman, you may be interested in noting that MBELDEF had the opportunity to monitor a case initiated by the Public Service Commission in the State of Nevada. The Nevada Commission

opened a case entitled "Re: Investigation by the Public Service Commission to Determine whether or not and to what extent Section 211 of Public Law 95-507 applies to Nevada Investor Owned Public Utilities." In an unprecedented ruling, the Nevada Commission ruled in part that all investor owned utilities within the Commission's jurisdiction should append to each annual report information relating to the nature of its minority- and women-owned business subcontracting practices.

If S. 1587 as it is currently proposed was enacted, both of these victories would never have taken place.

To quote our founder and chairman, Mr. Mitchell, "Corporations who do substantial business with the Federal Government must realize that engaging in minority contracting is not only good for this country and the minority business person, it is also the requirement of the laws of this country."

In closing, we caution you in your attempt to abolish the few inroads that have at least laid the basis for real opportunity.

Thank you for this opportunity. I will be prepared to answer any questions that you might have.

[Mr. Robinson's statement may be found in the appendix.]

Chairman BILBRAY. Thank you.

Ms. Millman.

TESTIMONY OF AMY J. MILLMAN, NATIONAL WOMEN'S BUSINESS COUNCIL

Ms. MILLMAN. Thank you, Mr. Chairman, Mr. Baker. My name is Amy Millman. I am the executive director of the National Women's Business Council. The council was formed by this committee in 1988 to look at the problems that women faced when they started new enterprises and tried to grow and maintain those enterprises.

We fully support the objectives of comprehensive reform of the Federal procurement system and wish to share with you our views on these bills. We would also like to comment on another bill, H.R. 2357, the Women's Business Procurement Assistance Act of 1993, introduced by Chairman LaFalce.

Our testimony also offers recommendations regarding certain improvements and clarifications which should be incorporated into the language of any procurement reform bill but cannot be found in any of the bills being considered by this Congress.

In 1988, Congress passed H.R. 5050, the Women's Business Ownership Act of 1988. This legislation, which created the National Women's Business Council, was the outcome of an in-depth investigation into the contributions of women-owned businesses to the economy. Census data collected the year before identified women as the fastest growing sector in the economy with 4.1 million businesses operating as sole proprietorships, partnerships and subchapter S corporations.

A more recent study conducted by the National Foundation for Women's Business Ownership estimated that there are now 6.5 million women-owned businesses, including C corporations. The next set of census data which will be available next year should support the trends in this study.

Even though we do not have current census data on hand, we do know that women have not achieved great successes in competing in the Government marketplace, especially in relation to their contribution to the economy as a whole. It is that inequity that we would like to address today in the context of the current debate.

As evidenced in the many bills passed by Congress in the last 5 or so years, it has been the intent of this body to direct the Government to balance its need for streamlined procurement with an important socioeconomic concern, ensuring that small businesses, minority-owned businesses are not shutout of the market.

We have a simple message to deliver today, and that is, that balancing efficiencies with socioeconomic concerns must not be lost in this current rush to reform. Many, but not all women-owned firms qualify as small businesses. Efforts to assist small businesses generally, of course, assist small women businesses as well. It is for this reason that we support the provisions in the pending bill to increase the small purchase threshold and reserve those contracts for small business, streamline the procurement system, and institutionalize the use of electronic commerce or EDI for both electronic notice and electronic bidding.

I know that others appearing before this subcommittee have mentioned the successes of at least one of the EDI pilot programs, the GAETEC system at Wright-Patterson Air Force Base. What you have not heard is that in the last year contract awards to women-owned firms at that base have more than tripled. This program was successful in meeting their small, disadvantaged and women-owned contracting goals because the procurement officials made the effort to reach out to these under-utilized sectors while the electronic system made access to bidding opportunities easy.

The council believes that this round of procurement reform should include congressionally mandated contracting and subcontracting goals for women-owned businesses. After more than a decade of voluntary executive branch goal setting, a recent study prepared for the SBA concludes that only where there have been legislative preferences have women-owned businesses made gains in receiving contract awards.

We would also urge that Congress continue its strong support for the 8(a) Program which is benefiting minority women-owned businesses.

It is also key that Congress retain the current requirement for prime contractors to have subcontracting plans and expand them and Section 8(d) of the Small Business Act to include women-owned businesses. My written testimony identifies eight laws which direct that women-owned businesses be given special consideration for contract awards. However, those eight laws involved programs in only 4 of the 57 executive departments and agencies in this Federal system.

It is clear that barriers to access to this sector are structurally ingrained in the current system, and it is long overdue for an overhaul. We know that there are sufficient numbers of women business owners eager to do business with the Federal Government but are frustrated at every turn. This system is not accommodating them, a fact clearly exhibited in the procurement goals and award data which Congress directed the executive branch to collect.

In fiscal year 1992, only 1.6 percent of all Federal procurement dollars were awarded to women-owned businesses. That's out of \$177 billion. Preliminary data on fiscal year 1993 awards show little improvement. Women-owned businesses will continue to be underutilized in the Federal market if Congress does not act to ensure their full participation in the new system.

Despite congressional action to establish goals for contracting with women-owned businesses and despite indications from Government officials that such socioeconomic programs and policies should continue, the current major proposals on procurement reform appear to neglect women-owned businesses almost entirely. We believe that the current legislation fails to acknowledge adequately Congress' commitment to women-owned businesses. The bills do not directly refer to women in their discussion of the socioeconomic programs to be continued and expanded across the Government. It is not clear whether this is deliberate, an oversight, or an assumption that women-owned businesses are included.

Whatever the reason, before the process goes any further the council believes that legislation must be clarified to make it crystal clear that women-owned businesses are included.

The National Women's Business Council is concerned that none of the proposals before you today go far enough to really improve the opportunities for this sector in the Federal marketplace. While the future holds great promise, once the reforms are fully implemented, without changes to the status quo during the transition period, no Federal agency or prime contractor will have reason to change the way they do business and seek out women-owned businesses.

We also realize that separate goals alone are not enough. The evidence compiled by the SBA's Office of Women Business Ownership suggest that agencies that have a commitment from the top and a person dedicated to outreach to women-owned businesses have produced significant increases in actual contract awards.

For this reason the council recommends that a pilot study be included in any procurement reform legislation. This pilot study would target three agencies: HHS, EPA, and GSA have been identified by us for identification of intensive outreach contract award initiatives, which really works to reach out to women-owned businesses. These agencies were selected because of their level of contract dollars and the commitment of senior officials in these agencies to reach out to women-owned businesses. As a matter of fact, we have gotten some agreements already from these agencies to work with us as carefully as they can.

The council also recommends that the Government use a single uniform definition of women-owned business for procurement purposes and continue efforts begun in the Department of Transportation to effect a single definition for use by States and localities receiving DOT funds.

In closing, we might note that a review of the current comprehensive procurement reform bills reveals but a single place where women-owned businesses are mentioned. It would establish education and training programs to increase the participation of women-owned businesses, as well as businesses owned by socially and economically disadvantaged individuals and minorities. While

we appreciate the gesture, that simple provision does nothing to bring about the change we seek.

We appreciate the opportunity to appear here today and look forward to working with you.

[Ms. Millman's statement may be found in the appendix.]

Chairman BILBRAY. Thank you. I appreciate all the comments. Certainly this committee and the staff will take into consideration all your provisions and proposals you have made.

Mr. Chvotkin, we have a question. Of all the witnesses you seem to be a little bit different on subcontracting plans. Could you go into the explanation of a little more detail why you think that the exemption should be given to subcontracting plans?

Mr. CHVOTKIN. I'll try, Mr. Chairman. First of all, let me tell you that company-wide plans has been the rule in the civilian agencies since 1980. Mr. Torrez in his testimony talked about the success that IBM, Kodak and other companies have had using those company-wide plans. So, that is very consistent. We have a long history that these plans can meet the task.

What we're supporting is using company-wide plans as an alternative—not a replacement—but an alternative to contract by contract reporting. We continue to support goal setting obligations on contractors to meet the best efforts to contract with small, small disadvantaged and women business owners. What we are seeking, though, is an alternative to the nonvalue added paperwork that's involved in the contract by contract reporting.

We do have a proposal, as I mentioned, to take the DOD test program and make that permanent, and more broadly available.

We do propose an exemption for commercial contracts. Our reasoning here is really very simple. The Government is coming into the marketplace as a purchaser. For most companies, the Government marketplace is a very small share of their total marketplace, total purchasing opportunity.

Most of the commercial companies do not have programs or don't establish programs that look at subcontractors on a contract by contract basis. They may look at it on a product basis. They may look at it on a facility basis. They may look at it on a yearly basis. But they don't look at their subcontracting opportunities on a contract by contract. That's why the current requirements under Public Law 95-507 create a barrier. So, we're looking to remove the barrier of contract by contract burden that's imposed.

There is no doubt that these plans are a barrier to bringing small businesses into the Government marketplace. Everybody knows that. There may be a tradeoff that has to be made, but they are still a barrier.

Furthermore, there is enormous underreporting of small businesses. We think that there are some changes that can be made to the reporting system that might demonstrate that small businesses are in fact, winning more awards and minority businesses are in fact, achieving more awards from the prime contractors as subcontractors. But simply, those elements lead us to conclude that subcontracting plans as currently administered need to be changed for commercial products.

Chairman BILBRAY. Thank you. Maybe someone else can, Ms. Millman or Mr. Robinson.

Yesterday's testimony pointed out that no one ever checks them. When somebody certifies that their subcontractor says, yes, I comply, I have so many minorities, I do this and that, no one every checks. Are we unrealistic to require, continue to require these forms to be signed and filled out when the Government does not have the resources or the will? Maybe the resources are there but they claim they don't, they don't have enough people to go down to a small company in Vermont to see whether they do have a percentage of minorities working for them and so forth.

Mr. ROBINSON. I think it's more a product of will as opposed to resources. We have been very active in reviewing subcontracting opportunities. As you suggest, the fraud that is involved in that process is very much disconcerting.

This fraud takes place with the active participation of the Government. Recently, for the first in the 20 years that these laws have been on the books, the Justice Department finally took a major contractor to court under the False Claims Act for this false and fraudulent reporting. So the issue is an issue of will.

Second, the climate, unfortunately, what I'm hearing is somehow the commercial marketplace, although larger, is setting the climate for the public sector. Well, as it relates to minority participation, and I suggest as well women-owned participation in the marketplace, the climate is set in the public sector for minority participation.

We have been very active in doing so-called disparity studies across the country in response to the Supreme Court decision in "Croson v. Richmond." What we have found is it is only when you have a legal mandate for participation of minorities and women do you find any participation at all. When that mandate is not there you invariably find zero participation rates.

Chairman BILBRAY. All right. Ms. Millman?

Ms. MILLMAN. We find the same thing. I couldn't agree with him more. It's not even just in enforcing the subcontracting plans, it's all throughout the whole process. For whatever reason, if there is not a legislative mandate or a clear carrot—it's almost a stick—an evaluation process for making sure that these things happen or won't happen, whether it's in the bidding process or whatever.

Chairman BILBRAY. So it's the opposite of Murphy's Law.

Mr. Chvotkin, do you have any counter or do you want to remain silent at this point?

Mr. CHVOTKIN. I'll take your wise counsel, Mr. Chairman.

Chairman BILBRAY. I believe the Minority Counsel has some questions for the witnesses.

Mr. ROWE. Thank you, Mr. Chairman.

Mr. Chvotkin, again going on with the subcontract plans, Mr. Robinson brought up the very salient point that among the items that would be considered commercial items would be things like jet aircraft, of course, helicopters, heavy equipment, automobiles, all these would be considered commercial items. For example, in jet aircraft a very large proportion of a jet aircraft purchase, say a 737, would be the engines, which I suspect are subcontracted from Boeing to General Electric or Pratt & Whitney.

Now, without flow-down, how do we ensure that General Electric is going to be doing the small business subcontracting that we

want? I find it, and I think my members find it, a little bit disconcerting that providing opportunities to small business is considered a nonvalue added item.

Could you explain how you get to that definition of nonvalue added?

Mr. CHVOTKIN. Yes, Mr. Rowe. Providing the opportunities to small and small disadvantaged businesses is not the nonvalue added item. The nonvalue added work is the paperwork. We have people filling out paperwork in the subcontracting plans rather than doing assistance.

I'm reminded of the analogy of President Clinton when he went to Children's Hospital and he talked to the doctors. The doctors and nurses were filling out forms rather than administering care to patients. He said, that's atrocious; we've got to get away from the paperwork.

That's what our subcontracting administrators are doing. They're filling out forms. They're not meeting with people. They're not going out and assisting businesses, they're complying with the quarterly reports and the annual reports and the contract completion reports. That's the nonvalue added work, not the efforts to do business with small business, not the effort to do business with minorities, not the efforts to do business with women.

Now, as to the question about the jet engines and the subcontracts to General Electric, I suspect that both of those companies have outstanding subcontracting plans. They are reviewed periodically by the Government. Boeing, I know is participating in the DOD test program on a company-wide basis. You might ask the Air Force specifically how they're doing and you might ask Boeing specifically.

The difference we make is when the Government is buying a Government-unique item or tailored item it has the right, it ought to require some participation, some performance. The different here is when General Motors is building Chevrolets by the thousands and the Government wants four of them, what does the requirement do to a subcontract plan on a contract-by-contract basis demonstrate about the extent to which small business will participate in the completion of those four cars. How does General Motors comply with that requirement? Simply they can't do that.

That's why we've come in with the request for the waiver of the subcontract reporting requirements on a contract by contract basis for commercial items.

Mr. ROWE. OK. Well, all right, I agree with you paperwork is a hideous thing. But I've heard it from the Department of Defense and other people who these folks do lots of small business subcontracting.

Now, I'm assuming in the course of business you keep records of who you're doing business with?

Mr. CHVOTKIN. Absolutely.

Mr. ROWE. If you know who you're contracting with. Maybe rather than completely exempting, what we need to do is think about a simpler way for the major contractors to document the fact that they are doing this business that they say they're doing.

Mr. CHVOTKIN. Mr. Rowe, we'd welcome the opportunity to work with you on that. If we could solve that problem we're well ahead of the game.

Chairman BILBRAY. Thank you. I think that was a very good point. Because maybe like they're trying to simplify medical forms, maybe we can simplify the reporting forms getting down to 1 or 2 pages rather than maybe 29 or 30 pages.

We appreciate the witnesses coming here today. We certainly received a lot of good information in the last 2 days. We will be moving forward on this bill and, hopefully, working with the other committees to finalize it. We do appreciate the time and the effort you put in to be here. Thank you again.

The meeting is concluded.

[Whereupon, at 11:44 a.m., the subcommittee was adjourned, subject to the call of the chair.]

APPENDIX

OPENING STATEMENT by
CONGRESSMAN RICHARD H. BAKER, RANKING MEMBER
Subcommittee on Procurement, Taxation & Tourism
February 1 and 2, 1994 Hearings on "Procurement Reform"

Mr. Chairman and other members of the Subcommittee, I thank you for calling these hearings on an issue of critical importance to our government - procurement reform. For years, many private and public groups have urged Congress to undertake comprehensive improvements to our federal acquisition system. I am genuinely pleased to take part in these hearings since they are designed to afford greater protection to small businesses nationwide from federal laws and regulations directives as we move to increase the efficiency and effectiveness of our government's purchasing system.

As I mentioned previously, the subject matter of these hearings is federal procurement reform. I have reviewed the written testimony offered by Mr. Steven Kelman, Administrator for Federal Procurement Policy, and it is abundantly clear that the proposed changes to the federal government's procurement process and procedures will impact small businesses in the U.S.

In Fiscal Year 1992, estimates indicate that the federal government spent more than \$200 billion on the purchase of goods and services. There are tens of million of these transactions, and they range from the major weapon-buying programs to two-by-fours to note pads. As you know, there are many pieces

of legislation in the House and Senate which concern federal procurement reform. I would like to take this opportunity to commend our Chairman for his work on H.R. 3586, the "Defense Acquisition Reform Act of 1993", as well as all of my colleagues at the House Government Operations Committee for their work on H.R. 2238, "The Federal Acquisition Act of 1993". Each one of those bills have made concrete statements concerning the role of small businesses in federal contracting in the future.

At this point, there is little doubt that Congress and the Administration are committed to federal procurement reform. The government needs this reform to guide its 142,000 employees dedicated to procurement. There are many issues that are of concern to the small business community, and I would like to take this opportunity to discuss them.

One of the major issues which concerns the small business community is the proposal to raise the simplified acquisition threshold from \$25,000 to \$100,000. Currently, the law allows agencies to make purchases of less than \$25,000 through those simplified procedures. The statutory requirements provide that the Department of Defense and the many civilian agencies post contracting opportunities under \$25,000. That posting guideline is designed to ensure that small businesses and local businesses are afforded adequate and timely notice of federal contracting opportunities. Federal acquisition regulations, however, encourage contracting officers to solicit oral offers below the amount of the small business purchase threshold. The proposed increase of

the SAT threshold to \$100,000 will affect over 45,000 new federal contracting opportunities worth billions of dollars. Many in the industry believe that the small business community is currently at great risk, and at this point I suggest that we proceed deliberately with the increase the SAT threshold as proposed by H.R. 2238. Linkage of the increase of the SAT threshold with electronic notification and electronic data interchange (EDI) appears to a reasonable way to achieve the goal of timely and adequate notice of federal contracting opportunities for small businesses.

Add to this discussion the federal government's intent to expand to an electronic marketplace, and you have a much more serious problem for small businesses throughout the country. Electronic notification and EDI will soon replace the Commerce Business Daily and the local posting requirements. The Defense Department and the civilian agencies will announce federal contracts on a nationwide electronic computer system. Eventually, the computer will serve a government-wide commerce system able to notify businesses of contracts, to make payments, and to engage in document interchange. EDI is intended to provide all businesses, including small businesses, with improved access to information about federal procurement. Undoubtedly, another result of this technological achievement is that businesses from all over the nation will be competing with one another for every single federal contracting opportunity.

The Administration, Congress, and many in the procurement industry want EDI and they want the SAT increased, so that the amount of time it takes to complete thousands of contract actions is decreased. I am firmly in favor of EDI and I would also like to see the SAT threshold increased, but I am very concerned with the manner in which we proceed on this issues. The threats to small businesses and local businesses are considerably increased if there is full implementation of EDI.

The problem I am concerned with is one that holds greater significance than government procurement reform. In my congressional district lies Fort Polk, home of the Joint Readiness Training Center and the 2d Armored Cavalry Regiment. This is the perfect time to commend all of the men and women stationed at Fort Polk for working so well with the surrounding business community over the years. Unfortunately, Fort Polk has been realigned and thousands of military and civilian personnel have left the Leesville, Louisiana community. Recently, the Army has taken several steps to reduce its overhead and operating expenses because of decreasing defense budgets. Also, it is one of the Defense Department sites designated for early implementation of EDI. All of those steps are the right ones given the set of circumstances, but a tremendous cost has been shifted to the Leesville community. I believe that the relationship between a military post and its surrounding community is a vitally important one. In many regards, it is a symbiotic relationship, and over the coming years with more military

downsizing and decreased military spending the need for cooperation between the two communities will only increase.

I believe that Congress and the Administration can actively promote a healthy relationship between military installations and their surrounding communities as we proceed with federal acquisition reform. In this regard, in the coming weeks I plan to introduce a bill to protect small businesses and local businesses from some of the risks of raising the simplified acquisition threshold and implementing electronic commerce. My bill could seek to define "local small business concerns", and protect them reasonably from the risks of being left out of the federal contracting process in the future. This legislation could set an attainable goal for all Federal agencies for each fiscal year by awarding a certain percentage of all procurement activities under the applicable simplified acquisition threshold to these local small business concerns. Another idea is to define those transactions which are inherently "local". Of course, there are many other issues -- the definition for local small businesses could be based on where the business concern is located, where a particular contract is scheduled for performance, where the contracting authority who is administering the contract is located.

The purpose of my legislation will be to strengthen procurement opportunities for local businesses, small businesses, economically depressed communities, and American communities nationwide. It seeks to ensure that the economies of the communities near federal contracting agencies, or

communities in which a federal contract is to be performed, are not adversely impacted as a result of federal acquisition reform and electronic data interchange. Mr. Chairman, I look forward to working with you and my other colleagues in the House in moving federal procurement reform in general, and this legislation in particular, forward so that we can assist in making our government more efficient while fostering an environment in which American small businesses can develop and continue to be the engine of economic improvement and job growth in our country.

I am also aware of the many other issues affecting small business that are being discussed as part of federal acquisition reform: small business and minority business subcontracting plans for commercial items, waivers of socioeconomic laws under pilot programs, expansion of the 1207 program to civilian agencies, and changes to the small business purchase reserve. I look forward to hearing the expanded debate this afternoon as we continue to educate and to enlighten Members of Congress on the finer points of these issues.

For these reasons, the testimony and comments over the next two days will serve to instruct the Subcommittee on these issues, and myself particularly as it concerns ongoing situations in my own congressional district. I thank you all of the panelists for their participation and thank the distinguished Chairman for exploring this critical issue at this time.

Opening Statement of the
Honorable James H. Bilbray
Chairman
Febrary 2, 1994

"Private Sector comments on Congressional reform proposals and how they will affect small business."

Today, the Subcommittee continues two days of unprecedented hearings to gage the effect of procurement reform proposals that are currently before the Congress.

Yesterday, we received testimony from Administration witnesses representing The Office of Federal Procurement Policy, the Department of Defense and the Small Business Administration. Today, we will be receiving testimony from a diverse group of individuals representing the

small business, minority and private industry communities. Their testimony today will serve to complete for the benefit of those who will be drafting the final house procurement reform package what thoughts and suggestions the private sector has with regards to federal procurement reform.

As we discussed yesterday, the proposals currently before the Congress along with the ideas previously expressed by both the Section 800 report and the National Performance Review, call for the creation of a system that will not only create a streamlined and efficient government purchasing environment, but will also create a fundamental shift in the small business government

purchasing environment. Proposals to increase the small purchase threshold and to create a commercial buying environment will dramatically change the small business environment.

It is estimated that over 80% of federal contract actions happen under \$100,000. The dramatic changes that increasing the small purchase threshold from \$25,000 to \$100,000 will create, requires us to carefully protect the access of information to small businesses. It is to this end that this subcommittee has been a very strong advocate of the creation of an electronic commerce system and has advocated linking the increase in the purchase threshold to the creation of an electronic commerce system.

In addition, all of the current proposals call for a move to a commercial purchasing environment which will allow the government to take advantage of commercial competitive forces, but will make it easier for sellers to sell off-the-shelf materials to the federal government. Although it will certainly be a benefit for the government to move to a commercial environment as opposed to the current cumbersome environment, it is essential that as we move in this direction we do not remove the current small business opportunities that we have sought for so long to create.

As small business and representatives of America's business interests, it is imperative that we receive your

thoughts on the current proposals. This Congress is committed to submit to the President, acquisition reform legislation this spring. However, your thoughts will help make sure that in our haste to reform we do not make it more difficult for small business and the private sector to contract with the government.

We appreciate all of you coming in today and we look forward to your testimony.



**SMALL BUSINESS
LEGISLATIVE
C O U N C I L**

Statement of

**E. Colette Nelson
Executive Director**

American Subcontractors Association

on behalf of the

Small Business Legislative Council

before the

**Subcommittee on Procurement, Taxation and Tourism
Committee on Small Business
U.S. House of Representatives**

February 2, 1994

**Statement of
Small Business Legislative Council
on Acquisition Reform Proposals
February 2, 1994**

The Small Business Legislative Council (SBLC) is a permanent, independent coalition of 94 trade and professional associations that share a common commitment to the future of small business. Our members represent the interests of small businesses in such diverse economic sectors as manufacturing, retailing, distribution, professional and technical services, construction, transportation and agriculture. See Attachment A for a list of SBLC members.

Many of the small businesses represented by SBLC do business with the federal government, either as prime contractors or subcontractors. The others are, of course, taxpayers. Thus, all of SBLC members have a strong interest in assuring that the federal government purchases good and services in the most appropriate and efficient manner. Thus, we strongly advocate efforts to streamline and simplify the acquisition system.

However, we strongly believe that such efforts must focus on the business realities of those in the private sector, especially small businesses and small disadvantaged businesses. Among the issues on which such reform must focus are those factors that impede small businesses from participating in the government procurement process. SBLC members report these factors include:

- identifying market opportunities;
- obstacles to participation, such as prequalification requirements, restrictive specifications, untimely access to necessary technical data, and the bundling of contracting opportunities;
- payment problems; and

- unnecessary or too burdensome recordkeeping and paperwork requirements.

In this statement, we will review and provide comments on H.R. 2238, the "Federal Acquisition Improvement Act of 1993"; H.R. 3586, the "Defense Acquisition Reform Act of 1993"; and S. 1587, the "Federal Acquisition Streamlining Act of 1993," from the perspective of these four factors. We also will comment on proposals which the Clinton Administration has asked be incorporated into acquisition reform legislation.

As we approach this legislation, we want to reemphasize points we made, as a member of the Small Business Working Group on the Section 800 Panel Report, before this subcommittee in its testimony on June 22, 1993. Procurement reform and procurement streamlining must not be solely for the benefit of those who are making purchases for the government or to the very few, very large contractors that obtain the vast majority of the dollars spent by the government. The legislation that ultimately is enacted must help ease the burdens and facilitate the participation of the small business concerns represented here today.

Quite frankly, it has been the experience of many in the small business community that the activities of the Federal Acquisition Regulation (FAR) are a source of many of the "complexities" of the procurement process that makes it difficult for small businesses to participate. Further, regulation writers, particularly the Defense Acquisition Regulatory (DAR) Council too frequently reflects a buyer bias -- that is, it fully implements the policies with which it agrees, but too frequently restricts the operations of the statutory mandates enacted by Congress to protect the seller, especially small businesses. Members of SBLC can provide examples of the regulation writers delaying or failing to implement laws dealing with competition, payment, small disadvantaged business participation and others. Years of such

experiences provide little reason to trust the Executive Branch and especially the procurement regulation writers.

Simplified Acquisition Threshold

Great emphasis has been placed by the Clinton Administration, like the Bush Administration before it, on raising the small purchase threshold of \$25,000 to \$100,000. The objective of this effort, in our view, is to eliminate the protections currently afforded by the Small Business Act to assure that small firms will have adequate prior notice of government contracting opportunities and adequate time to fashion an offer responsive to the government solicitation. The procurement bureaucracy vigorously opposed these protections when they were placed into law in 1984 and frequently have sought to undermine them both administratively and through proposed legislation. (See the testimony SBLC submitted in conjunction with other small business groups to this subcommittee on June 22, 1993, for a history of this abuse.) The procurement bureaucracy apparently have found "fresh" advocates on the new Clinton team.

SBLC and others in the small business and small disadvantaged business community have spelled out clearly what protections we believe need to be put in place to assure that small businesses have access to information and adequate time to compete for these \$100,000 "small purchase" contracts. These include:

(1) Linking any increase in the small purchase threshold with a concurrent obligation on the part of buying activities to improve local notice procedures. SBLC sees no incompatibility between the current statutory requirements to have local posting for ten days

before offers are solicited, whether they are solicited orally or in writing. Congress should make it explicit that the current right accorded small business concerns applies even when oral solicitations will be used. H.R. 2238 and H.R. 3586 do just that.

The Subcommittee will recall that when SBLC testified before you on June 22, 1993, we submitted for the record a letter to Dr. Al Burman, then the Administrator for the Office of Federal Procurement Policy (See Attachment B). In that letter, we asked Dr. Burman to use the authority granted the OFPP administrator in Section 6 of the Office of Federal Procurement Policy Act, to initiate action to amend the Federal Acquisition Regulation Part 13, Small Purchase and Other Simplified Procedures, to bring it into compliance with existing law.

Five months later, on November 17, 1993, Dr. Burman got around to asking the opinions of the three career officials from the Department of Defense, the General Services Administration and the National Aeronautics and Space Administration that along with the Administrator comprise the FAR Council (See Attachment C). Dr. Burman's inquiry to the other three regulatory barons didn't even set a timetable for them to respond.

Another two months have elapsed and the new OFPP Administrator Dr. Steven Kelman still has not responded to our June 21 letter. The disdain for the small businesses of this country is disheartening. The disregard for a statute, passed by Congress and signed by the President, is frightening.

Now we understand that the Clinton Administration has presented Congressional staff with a proposal to change the law to allow what they've been doing for ten years under their regulatory "repealer" of the offending statute. We can't help but be completely nonplused:

Finally called on the carpet, the procurement bureaucracy asks that the law be changed. The shocking part is that the Clinton Administration is willing to harm the small business community to make life easier for Federal buying agents.

Both H.R. 2238 and H.R. 3586 clarify the current statutorily-required posting requirements for contracting opportunities below the small purchase threshold by assuring that such postings occur even when the solicitations are made orally. We commend the sponsors for taking this important step. However, in light of the regulation writers disdain and disregard for the existing law, we strongly urge Congress not only to reject the Clinton Administration's proposal to weaken the existing law but to take immediate steps to assure that the 1984 statutory requirements are implemented properly and enforced, before giving further consideration to raising the current small purchase threshold or the establishment of a simplified acquisition threshold.

(2) Linking any increase in the small purchase threshold with a concurrent obligation to implement a coordinated government-wide electronic equivalent of the *Commerce Business Daily*. There is no question that the technology exists to implement an on-line system in a timely manner. We believe that *no buying activity should be allowed to use small purchase procedures on contracts over \$25,000 until it is participating in an electronic equivalent of the CBD.*

We support the provision in H.R. 2238 and H.R. 3586, which conditions the increase of the small purchase threshold to \$50,000 on the use of a government-wide system for notices of solicitations. We remain steadfastly opposed to any increase in the small purchase

threshold without the prior implementation of an electronic equivalent of the *Commerce Business Daily*.

In addition, we support the provision in H.R. 2238 and H.R. 3586, which conditions an increase in the small purchase threshold to \$100,000 on the actual implementation by a procuring agency of a common government-wide system providing for comprehensive electronic commerce, including notice of solicitation; responses to solicitations and requests for information; information with respect to such requests; orders; and public notice of awards. We strongly believe this is the most effective inducement to encourage the executive agencies to implement such electronic commerce. However, we would urge that a complete system for electronic commerce should include payment and not be limited in its ultimate application just to small purchases. The Treasury Department's Vendor Express demonstration program shows the benefits of electronic fund transfers to the vendor community and the Government.

S. 1587 has taken the approach of raising the small purchase threshold to \$100,000 without any linkage to the implementation of a system of electronic contracting. Under the provisions of S. 1587, a notice of a small purchase opportunity would have to be published in the *Commerce Business Daily* ten days prior to release of a request for offers. However, it would eliminate the current statutorily-specified response times of 30 days for all types of contracting other than research and development contracting (which provide 45 days for the contractor to prepare its offer). Under this bill, the procuring agency would be required to include in its *CBD* notice the amount of time for response and the type of contract expecting to result from the small purchase solicitation.

By requiring the agencies to specify publicly and in advance the response time allowed, as well as the complexity of the offer expected, the Senate sponsors apparently believed that "sunshine" would keep the response times practical in business terms. For example, a small purchase solicitation for a commonly available commercial item could have a substantially shorter response time (e.g., five days) if award were to be made on a price-only basis by a simple purchase order. Whereas, a solicitation for a proposal to do a complex technical effort, although only costing \$90,000, could not be expected to be prepared and submitted within the same five days.

While recognizing that the Senate bill takes an innovative approach to preserving the openness of the solicitation process while awaiting the implementation of electronic contracting, SBLC prefers the greater certitude provided by H.R. 2238 and H.R. 3586.

SBLC has been told that OFPP Administrator Kelman is likely to urge during his testimony before this Subcommittee on February 1, that Congress and the small business community should trust the Executive Branch to implement electronic contracting in a timely fashion and eliminate any statutory linkage to raising the small purchase threshold. Such an argument will likely be based upon the October 26, 1993 memorandum issued by President Clinton concerning streamlining procurement. In that memorandum, the President sets out a timetable for the Government-wide implementation of electronic commerce by January 1997.

Why shouldn't this be enough assurance?

First, we cannot realistically expect that the bureaucrats will faithfully execute the President's promises, since they work hard at "closing" rather than "opening" the procurement process. As we noted above, the regulation writers have effectively enforced for more than ten

years a regulatory "repealer" of the law passed by both houses of Congress and signed by the President of the United States.

Second, on January 27, the Department of Defense issued a news release (No. 034-94) announcing the release of its process action team report on electronic commerce. According to the news release, the report projects that after a two-year implementation period, DoD will be able to reach only 80 percent of its small purchases. If DoD, which clearly is substantially further ahead than the rest of the Government, only can cover 80 percent by January 1996, is it realistic to believe that the President's goal of complete Government-wide implementation of electronic commerce will be in place one year later?

(3) Eliminating the requirement that the small purchase threshold be raised automatically every fifth year in line with inflation. Based, we believe, on the urging of the Clinton Administration, H.R. 2238 contains a provision to raise the simplified acquisition threshold every five years in line with inflation. We believe that the demand by the Clinton Administration for this provision reflects the continuing effort by some in the Executive Branch to diminish the role of Congress, where the small business community generally has a better of chance of making its voice heard. Purchases below the proposed new \$100,000 simplified acquisition threshold account for nearly 99 percent of all contracting opportunities. We believe that it is only appropriate that Congress specify the threshold that defines such a large percentage of procurement opportunities intended for small business competition, particularly in light of past efforts of the Executive Branch to undermine congressional efforts to assure small business and small disadvantaged business participation.

(4) **Linking explicitly any increase in the small purchase threshold to an equal rise in the small business reserve.** All three bills make statutorily explicit that the small business reserve applies to any increase in the small purchase threshold. We strongly support these provisions.

It should be noted that the small business reserve does not ensure that small businesses win all contracts below the current \$25,000 small purchase threshold. In fact, an analysis by the staff of the Senate Small Business Committee in the mid-1980's, estimated that small business concerns win slightly less than 50 percent of the contracting opportunities below the current small purchase threshold. Before a contracting opportunity can be reserved for exclusive competition among small businesses, a contracting officer must make the determination that there is a reasonable expectation of two or more small business offerors capable of furnishing products or services meeting the Government's requirements at a price determined to be a fair and reasonable market price. While the electronic commerce demonstration conducted at Wright-Patterson Air Force Base showed this percentage can be increased to above 90 percent, it made clear that even with complete visibility small firms will not be the exclusive players in a \$100,000 small purchase market.

It is our understanding that the Clinton Administration has requested the Congress to not apply the small business reserve to any contracting opportunity below \$2500. The purported rationale for this exemption from the small business reserve is the desire to make more purchases through the use of Government credit cards, a procurement simplification recommendation contained in the Vice President's National Performance Review. The Vice

President advocates that Government agencies be able to make routine purchases from commercial sources, a significant number of which will not be small business concerns.

However, the \$2500 exemption is being advanced on an across-the-board basis without any linkage to the use of the Government credit card to actually make the purchase. We would urge the committee, if such a \$2500 threshold is advanced, that such a linkage be explicitly established in statute.

(5) Treating any contract below the small purchase threshold that cannot be awarded to a small business as being above the threshold until an electronic CBD equivalent is in place. This will assure that a contracting officer has no incentive to "game" the system -- to use the simplified small purchase procedures and yet award the contract to an other-than-small business, when qualified small businesses are available to perform the contract. Once universal access to information is assured by an electronic *CBD* equivalent, we do not believe this extra protection for small businesses will be necessary. None of the acquisition reform bills under consideration contain this provision.

(6) Making explicit the right of an offeror, especially a small business concern, to submit an offer when small purchase procedures are being used even if the government buyer has obtained the three quotations cited in the Federal Acquisition Regulation as meeting the competition requirement. In too many instances, three quotations has become the ceiling for the number of offers that will be considered. The statutory standard, maximum practicable competition, should not be interpreted to sanction arbitrariness by a government buyer. SBLC commends the sponsors of H.R. 2238 and H.R. 3586, for including this provisions in their

bills. It is our understanding that the procurement bureaucracy has won over Clinton Administration to strongly advocate that this provision be dropped from the bills.

(7) Statutorily establishing a threshold for competition. Both H.R. 2238 and H.R. 3586 statutorily prescribe the maximum dollar value for contracts that must be awarded pursuant to *some form* of competition. Currently, the so-called threshold for competition is specified in the government-wide FAR as 10 percent of the small purchase threshold. If the threshold were raised to \$100,000 and this regulatory threshold were left unchanged, the threshold for competition would rise to \$10,000, a sizable amount which was the entire threshold for small purchases until 1986. Further, without some statutory specification, it is perfectly conceivable that the procurement regulation writers could amend the FAR to make the threshold for competition a much higher number, solely at their own discretion.

(8) Requiring detailed reporting under the Federal Procurement Data System for any purchase of \$10,000 or above. Using the Individual Contract Action Report (SF 279) rather than the Summary Report (SF 281) will assure that small business and small disadvantaged business participation in small purchases can be accurately measured by the small business community as well as Congress. Without such detailed reporting, it will be impossible for Congress or the General Accounting Office to accurately assess small business participation with regard to the millions of procurement opportunities existing between \$10,000 and \$25,000. In any event, we are nonplussed at the executive agencies' objection to requiring their contracting officers to complete a one page form, when they demonstrate such little concern for requiring contractors to submit to burdensome reporting requirements that all too frequently generate literally reams of paper for each contractor's response.

We commend the sponsor of H.R. 3586 for providing such a reporting requirement for an adequate five-year period so that the results of the increase in the small purchase threshold can be seen. H.R. 2238 also includes a five-year reporting period, but accedes to the demands of the procurement bureaucracy for a reporting threshold of \$25,000 for five years. S. 1587 is the least favorable to the small business community, with a provision that establishing a \$25,000 threshold for only a three-year period.

(9) Mandating the use of fast pay procedures in contracts under the small purchase threshold awarded to small businesses. The Prompt Payment Act Amendments of 1988 included a provision that gave the executive agencies permissive authority to implement fast pay procedures for contracting opportunities below the small purchase threshold. However, the regulations implementing this provision virtually assure that fast pay procedures cannot be used. SBLC believes it is only equitable that legislation designed to expedite contract solicitation and award for the convenience of the government buyer also should expedite payment to the small business seller for performance. We are disappointed that none of the acquisition reform bills under consideration have addressed this important issue.

We also urge the committee to address additional threshold increases that have not been incorporated in H.R. 2238 or H.R. 3586. In particular, the increase of the current \$2,000 Davis-Bacon threshold and the \$2,500 Service Contract Act threshold are essential if the full benefit of a simplified acquisition threshold is to accrue equally to the buyer and the small business seller. It is well known that the Davis-Bacon Act carries with it not only obligations concerning rates of pay but collateral requirements regarding the submission of weekly payroll data.

(10) Linking the threshold for small claims procedures to the simplified acquisition threshold. The Contract Disputes Act of 1978 provides for a small claims procedure. Since 1978, the threshold for access to such small claims procedures has remained at disputes valued under \$10,000. Under the statute, small claims procedures are available at the election of the contractor. Given our belief that the simplified acquisition threshold increase should provide for a balancing of benefits between the buyer and the seller, we urge the Congress to permit small claims procedures to be available to a contractor for any contract below the simplified acquisition technique threshold.

(11) Increasing the threshold of other thresholds impacting on small purchases. SBLC commends the sponsors of H.R. 2238, H.R. 3586, and S. 1587 for raising the Miller Act threshold from \$25,000 to \$100,000 while making clear that alternative payment protections need to be accorded to subcontractors and suppliers.

The increase in the Miller Act threshold is important in expanding the access of small construction contractors and specialty contractors to construction contracting opportunities in both the government and the private sector. It is especially important to small contractors and specialty contractors owned by women and minorities. In fact, it will have an even more dramatic effect by creating opportunities for expanding the Small Business Administration's Surety Bond Guarantee Program. Currently, a substantial amount of the guarantee authority is utilized in providing guarantees for contracts less than \$100,000 in value. If that capacity could be redirected to larger contracts, it would make possible an increase in the maximum size bond that can be guaranteed under the program, currently \$1.25 million, to a much higher figure, possibly twice or even three times the current maximum. This would enable small

firms, especially women-owned and minority-owned small firms, to be able to compete for construction opportunities at the federal level, at the state and local levels, and in the commercial marketplace from which they are now excluded because of inadequate access to surety bonds.

However, SBLC believes that the use of alternative payment protections should be specified more clearly in the legislation. Again, we would observe that more than two years ago, OFPP issued a policy letter regarding the use of irrevocable letters of credit in lieu of payment bonds; the change has never been incorporated in the FAR because of the opposition of others in the Executive Branch. This despite the fact that OFPP's authorizing statute specifically says that any OFPP policy letter must be implemented in the FAR. Obviously, there is a parenthetical only visible to those within the regulatory bureaucracy: "only if we agree with what's in your policy letter."

We note that the Clinton Administration has sent a package to Capitol Hill calling for the increase in the Miller Act threshold, without the alternative payment protections for subcontractors and suppliers. Apparently, the Executive feels that the implementation of such payment protections would be too inconvenient for the procurement bureaucracy. Congressional concurrence with this demand would be a substantial disservice to small businesses, particularly small and emerging firms.

SBLC also recommends that Congress address additional threshold increases that have not been incorporated in any of the acquisition reform bills under consideration. In particular, the increase of the current \$2,000 Davis-Bacon threshold and the \$2,500 Service Contract Act

threshold are essential if the full benefit of a simplified acquisition threshold is to accrue equally to the buyer and the small business seller.

We note that the Davis-Bacon Act carries with it not only obligations concerning rates of pay, but the collateral requirements of the Copeland Act regarding the submission of weekly payroll data. SBLC believes this burdensome and unnecessary paperwork requirement should be replaced with a certification requirement.

Commercial Items and Subcontracting Plans

Another central pillar of the ongoing effort to streamline the acquisition process is statutory changes that would encourage the use of commercial products.. The small business community supports the use of commercial items through commercial item descriptions. Small firms in particular can emphasize to you the problems that flow from the Government's use of detailed design specifications, many of which are substantially outdated and call for components which are no longer available in the marketplace. It is small firms that are most hurt by the long delays in receiving Government approval for the substitution of currently-available components.

The reliance on commercial products that meet the government's needs has been a stated congressional objective since the late 1970's. An explicit statutory preference for the use of commercial product descriptions and functional specifications was included in the 1984 Competition in Contracting Act because of the potential for fostering broader competition in the federal marketplace. The preference for the acquisition of commercial products have been

included with increasingly detailed specificity in numerous pieces of legislation over the last ten years.

During the current debate, however, there has been a critical shift. Assertions are now being made that commercial products can only be acquired through the use of commercial buying practices -- practices which provide unlimited discretion to and place absolute power in the hands of the buyer. Such commercial practices are, in our view, fundamentally incompatible with a government procurement system which derives the resources to make the purchases from the taxes extracted from the very firms that are seeking to sell to the government. Fairness, openness and evenhanded treatment must be central to the government acquisition system, where these considerations are not important in a profit-driven commercial environment.

Another major shift can be found in all of the acquisition reform bills under consideration today. Each adopts a very broad definition of commercial products, which includes not only things that currently exists, but those which still may be under development but are intended by their developer to be sold as commercial products. When such a broadened definition is coupled with a sweeping elimination of statutory requirements that currently define the government procurement process, we believe alarm bells should be sounding.

The Clinton Administration has called for a still broader definition of commercial item.

In addition, the Acquisition Reform Working Group, which essentially is the membership of the Council on Defense and Aerospace Industries Associations (CODSIA),

which represents the very largest suppliers of defense-unique equipment, plus the Chamber of Commerce of the United States and the American Defense Preparedness Association, are now strenuously advocating an even more sweeping expansion of the concept of buying commercial products, as well as the shift to commercial buying practices. Their proposal would not stop with commercial products but would modify the definition of commercial item to include all forms of commercial services. As was discovered during the deliberations of the so-called Section 800 Panel, the Advisory Panel on Streamlining and Codifying Defense Acquisition Laws, the concept of commercial services ultimately encompasses virtually all services.

This sweeping expansion of the definition of commercial products, even those in H.R. 2238, H.R. 3586, and S. 1587, have a particularly damaging impact on the small business community when coupled with the elimination of so-called government-unique requirements. The proponents of the Government's commercial buying practices have declared that such requirements are unacceptable and costly to those wishing to do business with the Government. While cost estimates as high as 30 percent have been asserted, even a casual peek behind the assertions shows that there is little more than declarations by firms wanting to be freed of Government requirements. Hard data does not appear to exist to support these claims of unnecessary additional costs.

Some of these so-called Government unique requirements advance important public purposes that would otherwise go ignored by the major contractors if left to their own devices. The one that we would like to focus on obviously is the use of small business

concerns, including small business concerns owned and controlled by socially and economically disadvantaged individuals, as subcontractors and suppliers on major contracts.

The small business community is especially concerned with respect to the proposal advocated by the Clinton Administration and by the major contractors to eliminate such subcontracting requirements. Those subcontracting requirements were championed from this Small Business Committee throughout the 1970's and were finally enacted into law in 1978. The subcontracting plan requirement lays upon those major contractors who would do business with the Government contractual obligations regarding the establishment and performance of goals for small business participation and small disadvantaged business participation as subcontractors under those contracts.

Many members of this committee have long had a concern regarding the degree to which those goals represent the statutory standard of "maximum practicable opportunity" and, as you will hear from witnesses representing the minority business community, whether the Executive Branch has been aggressive in demanding compliance with the goals agreed upon by the contractor.

We commend the sponsors of the three acquisition reform bills under consideration for not succumbing to the entreaties of the major contractors to eliminate any requirement for subcontracting plans for commercial products or commercial services. Under their proposal, the requirements of Public Law 95-507 would remain intact; they simply would not apply to any procurements given the sweeping breadth of the definition of commercial items they advocate. The disturbing part is that their position is being advocated by the Clinton Administration.

The principal argument advanced to Congress by the major contractors and the Clinton Administration is that commercial firms already have in place an array of commercial relationships at the time they seek to offer their products or services to the government. This they maintain is equally true whether the item being offered is truly an off-the-shelf commercial item shipped to the government as-is, as it is to items that have not yet been manufactured or services that have not yet been designed or rendered but are merely intended at be offered at some future time. These major contractors suggest that it would wreak havoc on their established business relationships to have to deal with small business and small disadvantaged business firms unless those firms already happen to be a part of that firm's vendor base.

We would suggest that disrupting established business relationships, the hallmark of which were the exclusion of disadvantaged businesses or even small businesses generally, was one of the congressional objectives of requiring subcontracting goals and expecting their attainment.

SBLC also would observe that in their drive to market their products to foreign governments, these multinational corporations frequently accept offset requirements. Commonly today, a foreign government buyer requires that some percentage of the contract will be performed by subcontractors located in the nation making the purchase. Offset agreements merely are an effort by those foreign governments to advance the development and strength of elements of their business community. Major multinational corporations regularly seek to outbid each other in the size of the offered transfers of business opportunities.

SBLC finds it incongruous that we then are asked to accept the arguments of these multinational firms to eliminate requirements to expand participation by American small businesses while at the same time these firms are willing, if not eager to accept offset agreements that have the practical effect of exporting the manufacturing jobs.

Clearly, the offset demands of foreign governments, or in some cases foreign corporations are nothing but their equivalence of the very requirements that the multinational corporations claim are so incompatible with commercial buying practices. A cynic might observe that their only goal is to free themselves of any obligations to the United States Government so they have more opportunities to freely ship jobs overseas.

Another compelling argument against those that claim subcontracting plans are incompatible with commercial products acquisitions is the fact that since the late 1970's, unquestionably commercial firms such as Kodak, Xerox and IBM, have been operating under so-called company-wide plans for the participation of small businesses and small disadvantaged businesses. In 1988, Congress initiated a test of company-wide subcontracting plans with respect to major systems contractors in DoD. While the results of the DoD demonstration have yet to be reviewed by the Congress, those experiences plus the experiences of the true commercial product vendors undercut the arguments being advanced by today's witness for the Acquisition Reform Working Group and one of its members, the Chamber of Commerce of the United States, who argue that all subcontracting requirements must be eliminated to facilitate the acquisition of commercial products.

It would be unfair to this subcommittee if it were not noted that many in the small disadvantaged business community and some members of this Small Business Committee

question the effectiveness of company-wide subcontracting plans. They assert, and not without merit, that without intense oversight, there may be a tendency to relegate the small business and small disadvantaged business participation to peripheral services and support functions and exclude them from the core elements of contract performance. That assertion has been made in hearings before this Committee regarding the company-wide plans under which commercial firms are now operating and was a substantial concern at the time that Senator Sam Nunn, chairman of the Senate Armed Services Committee, advocated the DoD test program.

Rather than abandoning subcontractor participation requirements, SBLC advocates making those requirements more effective. Subcontractors frequently report that the existing subcontracting plan procedures lead to a practice known as "bid shopping." In addition, the goals too often have proven to be ephemeral when it comes time to measuring actual performance.

Other witnesses today will share with you the need for the Congress to revisit the technique of imposing liquidated damages on those major contractors who fail to meet their subcontracting goals. When enacted in 1988, this technique held substantial promise as an effective enforcement tool. But that promise, too, appears to have become quite empty in the face of absolute disuse by the procurement bureaucracy.

Recently, there has been increased discussion about harnessing the competitive marketplace with regard to the participation of small businesses and small disadvantaged businesses. This could be done by making small business and small disadvantaged participation at the subcontract level a criteria for award of the contract. Thus, if a competing

contractor wanted to win a contract, it would have to successfully respond to a contract solicitation requirement for a minimal level of small business participation and disadvantaged small business participation. If it failed to include those minimal levels, its offer would be considered nonresponsive and would not be considered any further. Similarly, a contractor offering a higher level of small business or small disadvantaged business participation would have its offer scored higher than that of a competing offeror who merely met the minimum in order to be considered responsive. Such a technique would harness competition among major contractors to include participation by small firms and small disadvantaged businesses.

Representative Cardiss Collins, a leading advocate for disadvantaged small business participation, has strongly urged that prime contractors also be required to list the subcontractors they intend to use and to provide the government notice when such subcontractors are to be eliminated from actual performance. This practice, adopted for construction contracts by several states and localities, is known as bid listing.

By making small business participation and disadvantaged small business participation an award consideration, the federal government would harness competition in order to expand that participation. If the Israeli government is smart enough to demand a high offset from those who would sell them fighter aircraft, the most recent example of which was discussed in the Friday, January 28 edition of *The Washington Post*, we should be no less demanding with respect to United States small business and small disadvantaged business participation in the prime contracts awarded to these firms. We must never forget that it is the tax dollars of American small businesses and their employees that fund a very large portion of the procurements of the United States Government.

We strongly urge that Congress, during its consideration of acquisition reform legislation, to carefully consider making this potentially sweeping change to the current techniques for fostering small business and disadvantaged small business participation.

Challenging the Actions of the Procurement Bureaucracy

One of the hallmarks of the 1984 Competition in Contracting Act was the strengthening of an aggrieved vendor to challenge what was perceived to be actions by the procuring officials that were contrary to law or regulation. The bid protest system at the General Accounting Office was made into a forum that could provide a real remedy to today's abuse as opposed to merely an admonition of a wrong doing that should not be repeated at a future time. Even more potent was the vesting of bid protest authority in the GAO Board of Contract Appeals for a range of procurements relating to the acquisition of automatic data processing equipment. Since that enactment, the procurement bureaucracy has worked steadily to fashion means, direct or indirect, to strip the public of these protections.

One example was raised during the deliberations of the Section 800 Panel. It would have required a protesting party to pay the legal fees and other costs incurred by the Government if the protest were deemed to be frivolous. Unfortunately, H.R. 3586 adopts this approach. This provision would have had a radically chilling effect on the ability of small firms to be willing to bring protests. We feel certain if a protest were raised, the agency would accuse the protester of raising a frivolous protest and would present to the firm's chief executive officer a projected bill for costs and expenses that would look like a major slice of the national debt. Therefore, we urge that this provision be dropped.

Similarly, we would urge that related provisions in H.R. 2238 and S. 1587 be eliminated. However, in the event the Congress determines to retain a provision relating to so-called frivolous protests, the formulations contained in H.R. 2238 and S. 1587 are less damaging than that in H.R. 3586.

Another attempt to indirectly reduce the effectiveness of the bid protest remedies accorded to the contractor community by the Competition in Contracting Act can be found in a provision of S. 1587. This provision would limit the rate of compensation for attorneys and expert witnesses to that available under the Equal Access to Justice Act (EAJA). SBLC already is concerned with the damage done to the hope provided by the EAJA through the judicial limitations on the standard under which the Government is liable, as well as the issue here -- the very low fees permitted. In the opinion of SBLC, the Congress should revitalize the EAJA and not export to the bid protest system one of the limitations that has rendered it impotent. We will press the Senate for the elimination of this provision and urge the House to avoid its chilling effects.

Rather than trying to scare contractors out of filing protests, the more effective means is to eliminate one of the principal reasons why protests are filed in the first place -- a belief that the offeror has not been treated fairly in the source selection process. Experience has shown that prompt, thorough and informative debriefings can go a long way to avoiding protests. Currently, contractors do not have a right to a debriefing under the applicable provisions of the FAR. All three bills would establish that right and would call for the prompt notification of contract award, an opportunity to request a briefing and the prompt conduct of the debriefing prior to the expiration of the unsuccessful offeror's right to file a post-award

bid protest. The timing of these events as set forth in H.R. 2238 is the most advantageous to small firms in practical terms, since it accords the longest period for the preparation of a protest deemed necessary by the aggrieved offeror.

So-Called Best Value Contracting

In recent years, much has been said within the procurement community of the need to broadly adopt the techniques of what has been labeled best value contracting. Under this purportedly new technique, considerations other than price could weigh heavily in the contract award decision. In reality, the Competition in Contracting Act made clear the authority of the Government to array the evaluation criteria, including price, and to announce the relative importance of those various criteria. Since 1984, what we have seen is a willingness of contracting officers to make use of this existing authority.

The concern from the small business community is the same as the concern expressed and recognized in the Competition in Contracting Act -- that the solicitation must clearly identify the factors to be evaluated and make clear the weighting of those individual factors. Unfortunately, the procurement community has been unwilling to ascribe precise weightings to the various evaluation factors, including price. It is this degree of subjectivity that always has given the small business community pause concerning so-called best value contracting.

The bills being discussed today all contains provisions which would extend to the civilian agencies provisions currently applicable to DoD. These provisions call for the identification of the relative values ascribed to various evaluation factors and subfactors. Again, SBLC suggests that during the consideration of these provisions that the issue of

greater specificity and less subjectivity be placed squarely on the table. The Government should not be free to adjust the award criteria after the proposals are received to produce the "desired" award decision.

Task and Delivery Orders -- An Invitation to More Contract Bundling

Another central streamlining feature of the three bills being discussed today is the encouragement of the use of broad multi-year task and delivery order contracts. Under such task and delivery order contracts, an array of potential government requirements for supplies or services would be grouped and offered for competition among vendors capable of meeting the full range of services or items of supply that might be ordered. Single or multiple contracts might be awarded with a statutory preference for multiple awards to maintain some minimum competition among the two or more firms awarded contracts.

From the perspective of the small business community, the problem lies in the aggregating of ever increasing numbers of types of services or products into fewer larger and larger contracts, as the procurement agencies seek to reduce the number of contracts to be awarded and administered. Further, the bills under consideration envision multi-year contracts of up to five years duration.

The chairman of today's hearing has taken a leading role in examining the problems of contract bundling as they negatively impact the small business community. Yet his bill, H.R. 3586, like the other two bills, would accelerate the contract bundling phenomenon.

Reliance on the Private Sector

SBLC, like all of the small business groups, has a steadfast position that commercial activities should not be performed by government at any level. Resolutions in this regard placed high in the recommendations of both the 1980 and 1986 White House Conferences on Small Business. Issue papers on the same topic are being developed in preparation for the 1995 Conference. Competition from the Government is on the rise as government agencies and particularly their laboratories, research organizations and industrial type facilities find themselves with insufficient work to keep themselves fully occupied. The issue always has been a serious one to the small business community and certainly will become a point of contention as government agencies seek to expand the work performed by their employees by drawing from work properly contracted to the private sector. We are disappointed that this issue is not addressed in what is being hailed as fundamental change to the way the Government acquires the goods and services needed to meet public needs.

Disputes Resolution

S. 1587 contains a series of improvements to the Contract Disputes Act of 1978. One of the most important is a specification of a six-year limitation on the filing of claims relating to a Government contract. Such claims shall be submitted within six years after the occurrence of the event or events giving rise to the claim. SBLC strongly supports this provision.

In addition to raising the small claims threshold as previously discussed relating to the simplified acquisition technique threshold, SBLC also recommends that any final procurement

reform package adopted include an increase of the existing \$50,000 threshold for accelerated procedures under Section 8(f) of the Contract Disputes Act to \$500,000. We note that the accelerated procedures threshold has not been increased since 1978.

SBLC also notes that the authority for using alternative disputes resolution techniques expires on October 1, 1995. We urge the Congress to extend the use of alternative disputes resolution and diminish the ability of the agencies to inhibit the use of the techniques currently provided under Subchapter IV of Chapter 5 of Title 5 of the United States Code.

Prompt Resolution of Change Orders and Final Contract Close Out

None of the bills being considered today address issues that affect whether an otherwise successful contract will wind up on the credit or debit side of a small firm's ledger. The first of these is the resolution of contract change orders. The Government retains the right to direct the contractor to make modifications to the scope of contract performance to meet the needs of the Government. Since such modifications are beyond the work otherwise required of the contractor by the contract as awarded, the contractor often is entitled to additional compensation. Such claims for increased compensation generally must be subjected to review and audit prior to being decided upon by the contracting officer. All too frequently, the resolution of the amount to be paid is substantially delayed. While the Contract Disputes Act gives the contractor the right to assume an adverse decision 180 days after the submission of a claim for an equitable adjustment, the filing of such a claim can ensnare the contractor into yet an even longer delay before receiving the sums due.

A similar situation exists at the end of the contract when amounts withheld during contract performance cannot be released until the Government has conducted a final audit. Given the limited and ever decreasing personnel resources within the various audit organizations, the priorities ascribed to close-out orders and the release of funds due the contractor is not especially high. Unfortunately, a "when we get around to it" attitude too frequently pervades the process.

While our previous recommendations regarding increasing the threshold for small claims procedures and accelerated claims procedures may be helpful in resolving both of these issues, we urge the Congress to consider an additional mechanism to force the contracting officer to give timely attention to requests for contract adjustments and the resolution of contract close outs. Such technique could be based upon the interest penalty provisions of the Prompt Payment Act. For example, with respect to delayed action on a request for a contract adjustment, the interest penalty could be doubled in the event that the contracting officer failed to act upon the request by the 180-day period specified in the Contract Disputes Act. With regard to contract close out, interest could be deemed to accrue from the date of last delivery or completion of contract services if the Government had failed to release funds more than one-year after the date of such final performance.

Prompt Payment

One of the most serious barriers to small business and small disadvantaged business participation in the government marketplace is poor payment practices. The acquisition reform bills pending before Congress fail to address this important issue, except for the consolidation

of various provisions concerning contract financing of DoD contracts that are dispersed throughout Title 10 of the U.S. Code. SBLC believes this codification effort will add clarity, benefiting DoD contractors, small as well as large. However, we are disappointed that the legislation fails to go further.

First, we must call your attention to still another instance in which the regulation writers have elected to ignore statutory requirements for the convenience of the procurement bureaucracy and at the expense of small firms doing business with the Government.

The Prompt Payment Act Amendments of 1988 (Public Law 100-496) specifically required:

"The Federal Acquisition Regulation shall be modified to provide appropriate solicitation provisions and contract clauses that implement chapter 39 of title 31, United States Code, as amended by this Act, and the regulations prescribed under section 3903 of such title (as amended)."

The 1988 Amendments also required the Director of the Office of Management and Budget to issue a revised directive to the various departments and agencies.

A final rule, incorporating some of the 1988 amendments into the FAR was issued on March 31, 1989. A revision to Office of Management and Budget Circular No. A-125, "Prompt Payment," incorporating the 1988 amendments and directing the agencies to comply, was published on December 21, 1989.

Although more than five years have passed since enactment of 1988 Amendments to the Prompt Payment Act and more than four years have passed since publication of the revision to OMB Circular A-125, many of the provisions of the Act and the OMB Circular have not been incorporated into the FAR. As a result, many Federal contractors and subcontractors are being denied the full protections afforded by the Prompt Payment Act as

amended in 1988. And most businesses serving as contractors to the Federal Government are not fully cognizant of their rights and remedies under the Act.

Provisions of the Prompt Payment Act and/or OMB Circular A-125 that have not been fully implemented in the FAR include:

- Additional penalties for agencies that fail to pay a late payment interest penalty as required;
- Payment date for an electronic fund transfer;
- Information to be included in an agency's notice of interest penalty;
- Adjustments for agency errors in calculating interest;
- Mailing date of checks;
- Substantiation of construction progress payments;
- Applicability to foreign vendors;
- Fast pay for small purchases; and
- Periodic payment for periodic performance.

SBLC urges Congress to take action to require OMB to compel compliance by the FAR Council to amend the FAR to comply with OMB Circular A-125, and the underlying 1988 amendments to the Prompt Payment Act.

We also urge the Congress to consider other amendments to the Prompt Payment Act to assure timeliness of payment to all vendors.

Progress Payments (for Other-than Construction Contracts)

First, SBLC recommends that the Prompt Payment Act be amended to more explicitly provide for progress payments for work performed. Currently the Prompt Payment Act excludes progress payments, other than those for construction, from coverage under the Act on the basis that they are "contract financing payments." This exclusion was advocated in 1988 by associations representing major systems contractors. As a result, small business contractors, especially those in the professional and technical services area, whose work generally is performed in stages and are paid progress payments, are not being protected

under the terms of the Act. The Prompt Payment Act Amendments of 1988 sought to resolve such problems by explicitly providing for periodic payments for periodic performance as avoiding the "progress payment" exclusion. However, as noted above, the FAR failed to adequately implement this statutory directive.

Subcontractor Payment

Subcontractors and suppliers with federal contracts in all industries continue to complain that they have difficulty getting paid by their prime contractors. Late payment has a particularly damaging effect on small businesses.

Section 806 of the National Defense Authorization Act for FY 1992-93 required both the DOD Inspector General and the General Accounting Office to conduct studies on subcontractor payment.

The DOD IG was directed to determine the extent to which DOD uses payment protections for construction subcontractors and suppliers and the adequacy of internal control procedures related to payment protections. The IG issued a report on February 19, 1993, which concluded that generally contracting officers were not aware of available administrative and judicial remedies to deter false payment certifications. As a result, subcontractors and suppliers are not afforded all protections provided by the Prompt Payment Act.

The GAO was directed to identify existing statutory and regulatory provisions that help provide timely payments to subcontractors and suppliers working on federal contracts and to evaluate the feasibility and desirability of additional payment protections for subcontractors. The GAO issued a report on May 28, 1993, which recommended that "the Secretary of Defense issue policies and procedures for (1) identifying the circumstances under

which contracting officers should take action to provide payment protection for subcontractors and (2) implementing appropriate payment protection techniques."

Eleanor R. Spector, Director, Defense Procurement for the Department of Defense, issued letters in response to both reports. In those letters, she agreed to issue within 60 days a memorandum to the military departments addressing the importance of subcontractor payment, and specifying how to verify the accuracy of payment certifications, what actions to take when the certification is wrong, and techniques to use when contract performance may be jeopardized due to subcontractor payment problems.

SBLC felt that the recommended and promised actions were insufficient. Nonetheless, we looked forward to this first step toward improving subcontractor payment. Instead, we once again were faced with a member of the FAR Council failing to take actions that would assure small business protection from the predatory actions of government contracting officers or prime contractors.

We also note that Section 806 required DoD to implement regulations assuring that subcontractors and suppliers have access to information they need to make informed business decisions with respect to payment. The agencies were given authority to implement such regulations governmentwide. As could be expected, the FAR Council has taken no action to do so.

In light of this continued inaction by the Executive, SBLC believes it is time for Congress to amend the Prompt Payment Act to include subcontractor payment protections similar to those already in effect for construction subcontractors for other types of subcontractors and suppliers. In addition, we recommend giving the contracting officer greater

authority to assure subcontractor payment, including the use of escrow accounts and direct disbursement.

Regulatory Restrictions on Submission of Invoices

The Defense Commissary Agency has implemented a system called "roll-ups" under which a contractor is required to combine or "roll-up" its invoices into a single invoice every two weeks. An invoice that is not "rolled-up" is declared "improper" and returned to the contractor. Under such a system, an agency could designate specific times that a contractor could submit an invoice (e.g., every 30 days, every 180 days, every 365 days). If a contractor submitted an invoice outside of that period, it could be deemed "improper" for purposes of the Prompt Payment Act.

SBLC recommends that Congress amend the Prompt Payment Act to make explicit a contractor's right to submit an invoice any time after performance and prohibit "roll-ups" or other methods of unilaterally restricting when an invoice can be submitted.

Federal Grant Programs

Contractors often find themselves in a "Catch 22" situation, when late payment problems arise on federally-assisted contracts. Without question, the federal Prompt Payment Act does not now apply to contracts awarded by state and local recipients of federal grants. Rather, they are told to look to state law. Almost all states have some type of prompt payment statute. Some of these laws provide strong payment protections for all members of the contract team; others do not. In addition, some state legislatures left large loopholes regarding contract payments made with federal grant funds. In practical terms, a state agency can point to these provisions, often loosely worded general exceptions, to conveniently ignore

late payment interest penalties when the late payment pertains to a federally-assisted contract.

The contractor finds itself in a "twilight zone" between federal law and state law.

SBLC recommends that Congress extend the Prompt Payment Act to require state and local government recipients of federal grants to pay their vendors promptly.

Legislative and Judicial Branches

The Prompt Payment Act currently does not apply to the legislative and judicial branches, both of which do a significant amount of purchasing from small businesses. Contractors and subcontractors to these branches of government report significant problems with late payments.

SBLC recommends that Congress extend Prompt Payment Act standards to the legislative and judicial branches.

Truth in Negotiations Act

The Truth in Negotiations Act (TINA) requires contractors to submit cost or pricing data before the award of a contract or contract modification expected to exceed \$500,000. Similar requirements are imposed on subcontractors, who must submit such data to the prime contractor. The Government also may require the submission of cost or pricing data below the \$500,000 threshold if it believes the data is necessary to determine price reasonableness. Current law stipulates that the \$500,000 threshold will be reduced back to the 1984 level of \$100,000 after December 31, 1995.

The acquisition reform legislation pending before Congress would retain the TINA threshold at \$500,000. SBLC supports this recommendation for a number of reasons.

First, small businesses always have been troubled by the paperwork burdens associated with TINA. Small business concerns have little trouble determining the currentness, completeness or accuracy of their data and are able to easily provide a certification. The problem is that the data has to be maintained, arrayed and presented in a format and on forms prescribed by the government, rather than those meeting the firm's usual practices. In large measure, some of the burden of TINA could be eliminated if the government, in general, and DoD in particular, complied with the Regulatory Flexibility Act, with respect to implementation of TINA. In the absence of such compliance, the higher threshold is beneficial.

Second, small businesses are much less able to effectively defend themselves against a government defective pricing charge. In such a case, the full power of the government is arrayed against a small firm. A small business has little choice but to reach a settlement or face extensive penalties and the possibility of being charged with fraudulent activity, which could lead to suspension and complete elimination from the government market.

Pilot Programs

The new Administrator for Federal Procurement Policy is strongly advocating a substantial broadening of the testing authority currently provided under the Office of Federal Procurement Policy Act. Under current law, the Administrator can devise and, after appropriate notice and comment, implement programs to demonstrate innovative procurement techniques that include the waiver of regulations, policies, procedures and forms. In the event that the Administrator requires the waiver of statutes for the effective conduct of the test

program, Congressional approval must be obtained. The Administrator would seek to grant himself a blank check for the waiver of statutes for the conduct of procurement demonstration programs.

SBLC is unalterably opposed to such a sweeping grant of authority to even a senior presidentially-appointed and Senate-confirmed individual. Statutes are made by a concurrence between the Legislative and the Chief Executive of what constitutes good public policy. Such agreement between the Chief Executive and the representatives of the people should not be unilaterally waivable solely by an appointed representative of the elected Chief Executive.

The proper approach is that currently being pursued by the Department of Defense, which has formulated specific pilot programs, which include a listing of the statutes to be waived and a justification of why they should be waived. While SBLC remains deeply concerned with the specifics of the proposed pilot programs offered to the Congress by DoD in the closing days of last year's DoD Authorization bill conference, we do agree that the process of coming forward with specific tests and specific waivers is the appropriate approach.

Neither S. 1587 nor H.R. 3586 contains an expansion of the testing authority currently vested in the OFPP Administrator.

H.R. 2238, on the other hand, does contain provisions which seek to authorize an expansion of the Administrator's authority to test alternative and innovative procurement procedures, which unfortunately includes the authority to waive statutes. The Conyers-Clinger substitute does seek to limit the impact of such a grant of authority in a number of ways. Unfortunately, in a description of the types of procedures authorized to be tested, there is an

unacceptable focus on attempting to limit full and open competition. The procedures cited are replete with invitations to limit notice, prequalify contractors or otherwise diminish the right of a qualified contractor to have a timely and responsive offer received.

In all fairness, H.R. 2238 does include a number of issues regarding the reduction in the size of proposals, the duration of the evaluation of proposals received, and the publication of proposed solicitation documents for public comment. However, it should be noted that most of the positive procedures among the candidates for testing would not require any waiver of statutes; only those which would seek to close the process would require statutes to be waived.

In summary, the waiver provision in H.R. 2238 would leave in the hands of the OFPP Administrator the ability to sweep away all the protections developed over more than a decade to assure that business concerns, large as well as small, can participate in an open and fair acquisition system. If enacted, it would cast aside many restraints upon the procurement community to assure openness and fairness. It would permit the procurement community to run rough shod over the legitimate rights of a qualified firm to sell its products or services to its own Government.

Assuring Regulatory Implementation

Whatever the final text of the acquisition legislation ultimately enacted by the Congress and sent to the President, it must provide the most detailed exposition of the policies which the Congress intends to have implemented. Such statutory language must be

supplemented by a statement of managers that leaves little doubt as to Congress' expectation regarding implementation.

In addition, the statute must specify dates by which proposed regulations shall be issued for public comment. In this regard, we take special note of a provision in S. 1587, which amends the OFPP Act to make 60 days rather than 30 days, the norm for the opportunity for public comment on proposed regulations.

Finally, the statute must establish a firm date by which final regulations will be published and become effective.

Without such dates, and without unequivocal statutory mandate to provide a realistic public comment period, we will see a repetition of the all too frequent saga of final regulations being published on the last day before a statutory deadline without opportunity for public comment.

The statement of managers also should make explicit the Congress' intention to hold the regulation writers accountable for compliance with the Regulatory Flexibility Act, the Paperwork Reduction Act and Executive Order on regulatory review and planning.

Conclusion

The small business community's experience with the Federal Government's procurement system generally has not been commensurate, in practical terms, with the oft-repeated statement encouraging small and small disadvantaged business participation as a national policy. Without protections in the contract formation process, the contract

administration process and the disputes resolution process, small firms have gotten very rough treatment at the hands of the procurement workforce.

SBLC believes that efforts to streamline the federal procurement system should focus on the business realities of those in the private sector, particularly small business concerns. Such reforms should assure that small businesses have an opportunity to identify and respond in a timely manner to contracting opportunities. They also should assure that contract administration procedures not impede performance by the contractor.



Members of the Small Business Legislative Council

Air Conditioning Contractors of America
 Alliance for Affordable Health Care
 Alliance of Independent Store Owners and Professionals
 American Animal Hospital Association
 American Association of Nurserymen
 American Bus Association
 American Consulting Engineers Council
 American Council of Independent Laboratories
 American Floorcovering Association
 American Gear Manufacturers Association
 American Machine Tool Distributors Association
 American Road & Transportation Builders Association
 American Society of Travel Agents, Inc.
 American Sod Producers Association
 American Subcontractors Association
 American Textile Machinery Association
 American Trucking Associations, Inc.
 American Warehouse Association
 American Wholesale Marketers Association
 AMT-The Association for Manufacturing Technology
 Apparel Retailers of America
 Architectural Precast Association
 Associated Builders & Contractors
 Associated Equipment Distributors
 Associated Landscape Contractors of America
 Association of Small Business Development Centers
 Automotive Service Association
 Automotive Recyclers Association
 Bowling Proprietors Association of America
 Building Service Contractors Association International
 Business Advertising Council
 Christian Booksellers Association
 Council of Fleet Specialists
 Direct Selling Association
 Electronics Representatives Association
 Florists' Transworld Delivery Association
 Helicopter Association International
 Independent Bakers Association
 Independent Medical Distributors Association
 International Association of Refrigerated Warehouses
 International Communications Industries Association
 International Formalwear Association
 International Television Association
 Machinery Dealers National Association
 Manufacturers Agents National Association
 Manufacturers Representatives of America, Inc.
 Mechanical Contractors Association of America, Inc.
 National Association for the Self-Employed
 National Association of Brick Distributors
 National Association of Catalog Showroom Merchandisers
 National Association of Home Builders
 National Association of Investment Companies
 National Association of Plumbing-Heating-Cooling Contractors
 National Association of Private Enterprise
 National Association of Realtors
 National Association of Retail Druggists
 National Association of RV Parks and Campgrounds
 National Association of Small Business Investment Companies
 National Association of the Remodeling Industry
 National Association of Truck Stop Operators
 National Association of Women Business Owners
 National Chimney Sweep Guild
 National Coffee Service Association
 National Electrical Contractors Association
 National Electrical Manufacturers Representatives Association
 National Fastener Distributors Association
 National Food Brokers Association
 National Grocers Association
 National Independent Flag Dealers Association
 National Limousine Association
 National Lumber & Building Material Dealers Association
 National Moving and Storage Association
 National Ornamental & Miscellaneous Metals Association
 National Paperbox Association
 National Shoe Retailers Association
 National Society of Public Accountants
 National Tire Dealers & Retreaders Association
 National Tooling and Machining Association
 National Tour Association
 National Venture Capital Association
 Opticians Association of America
 Organization for the Protection and Advancement of Small Telephone Companies
 Passenger Vessel Association
 Petroleum Marketers Association of America
 Power Transmission Representatives Association
 Printing Industries of America, Inc.
 Professional Plant Growers Association
 Promotional Products Association International
 Retail Bakers of America
 Small Business Council of America, Inc.
 SMC/Pennsylvania Small Business
 Society of American Florists
 The Council of Growing Companies
 United Bus Owners of America

June 21, 1993

The Honorable Alan V. Burman
 Administrator
 Office of Federal Procurement Policy
 Office of Management and Budget
 Room 350, Old Executive Office Building
 Washington, D.C. 20500

Dear Dr. Burman:

The undersigned organizations request that, under the authority granted the Administrator of the Office of Federal Procurement Policy in Section 6 of the Office of Federal Procurement Policy Act, you initiate action to amend the Federal Acquisition Regulation Part 13, Small Purchase and Other Simplified Purchase Procedures, to bring it into compliance with existing law.

Section 18 of the OFPP Act (and the parallel provision in Section 8(e) of the Small Business Act) states:

"(B) an executive agency intending to solicit bids or proposals for a contract for property or services shall post, for a period of not less than ten days, in a public place at the contracting office issuing the solicitation a notice of solicitation described in subsection (f)--

"(i) in the case of an executive agency other than the Department of Defense, if a contract is for a price expected to exceed \$10,000, but not to exceed the small purchase threshold; and

"(ii) in the case of the Department of Defense, if the contract is for a price expected to exceed \$5,000, but not to exceed the small purchase threshold."

The OFPP Act further provides that these local postings provide essentially the same information as the notices that appear in the *Commerce Business Daily* for contracting opportunities above the small purchase threshold.

Unfortunately, the provisions in FAR Part 13 are not in compliance with the OFPP Act. FAR 13(b) states that no posting is required if the small purchase buyer chooses to solicit offers orally (i.e., telephonically). In addition, it states: "Generally, quotations shall be solicited orally" Not surprisingly, this admonition of the FAR generally is followed by those conducting small purchases.

The Honorable Alan V. Burman
 June 21, 1993
 Page Two

As a result of this provision, small businesses all too frequently are unaware of small purchase opportunities. Thus, we strongly recommend that FAR Part 13 be amended to require that local postings be required on all procurements between \$5,000 and \$25,000 for civilian agencies and between \$10,000 and \$25,000 for DOD, as required by Section 18 of the OFPP Act.

In addition, FAR 13(b)(5) states:

"Generally, solicitation of at least three sources may be considered to promote competition to the maximum extent practicable."

We have had reports of contracting officers refusing to accept quotations from sources not solicited by federal buyers. Thus, offerors Nos. 4, 5 and 6 often have to fight their way into the process.

We believe this FAR provision is in direct contravention of the Federal Property and Administrative Services Act of 1949 (and Title 10). Section 303(g)(4) of that Act (and 10 U.S.C. 2304) states:

"In using small purchase procedures, an executive agency shall promote competition to the maximum extent practicable."

Further, Section 309(b) of that Act (and 10 U.S.C. 2302(2)(3)) states:

"The term 'competitive procedures' means procedures under which an executive agency enters into a contract pursuant to full and open competition. Such term also includes:

...

"(4) procurements conducted in furtherance of Section 15 of the Small Business Act (15 U.S.C. 644) as long as all responsible business concerns that are entitled to submit offers for such procurements are permitted to compete; . . ."

Thus, we further recommend that FAR Part 13 be amended to specifically state that a buying activity must consider offers from all responsible small business concerns.

Your office, as well as others in the Executive Branch, have requested that Congress raise the existing small purchase threshold of \$25,000 to \$100,000. We in the small business community strongly believe that the 1984 procedures, which were enacted when the small purchase threshold was last raised, should be fully and properly implemented before Congress seriously considers further legislation on this issue. Thus, we urge you to act as expeditiously as possible.

The Honorable Alan V. Burman
June 21, 1993
Page Three

If you need further information about this request, please contact Colette Nelson at
703-684-3450

We look forward to your response to our letter as well as your prompt action to amend the
FAR.

Sincerely yours,

American Gear Manufacturers Association
Independent Defense Contractors Association
Latin American Management Association
Minority Business Legal Defense and Education Fund
National Association of Credit Management
National Association of Minority Business
National Association of Women Business Owners
National Center for American Indian Enterprise Development
National Federation of Independent Business
National Small Business United
Small Business Legislative Council
U.S. Chamber of Commerce

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

November 17, 1993

Ms. Colette Nelson
Chairman, Procurement Committee
Small Business Legislative Council
1004 Duke Street
Alexandria, VA 22314

Colette
Dear Ms. Nelson:

This letter is in reply to concerns raised by the Small Business Legislative Council and other representatives of the small business community in correspondence to the Office of Federal Procurement Policy (OFPP) regarding Part 13 of the Federal Acquisition Regulation (FAR). Part 13 of the FAR deals with small purchase and other simplified purchase procedures.

The letter recommends that FAR Part 13 be amended to require local posting on all procurements -- including those where offers are solicited orally -- between \$10,000 and \$25,000 for civilian agencies and between \$5,000 and \$25,000 for the Defense Department. It further recommends that the FAR be amended to specifically require that a buying activity consider offers from all responsible small business concerns. The letter requests that OFPP initiate action on FAR amendments pursuant to Section 6 of the Office of Federal Procurement Policy Act (OFPP Act), 41 U.S.C. § 405.

Before taking action under Section 6 of the OFPP Act, I am asking for comment on these issues by the Director of Defense Procurement, the Associate Administrator for Acquisition Policy at the General Services Administration and the Associate Administrator for Procurement at the National Aeronautics and Space Administration. A copy of my letter to these individuals is enclosed.

As you are aware, we are presently working with Congress to bring about important procurement reforms to improve the way the Government buys goods and services. An important focus of our efforts is on making the Federal contracting process more accessible to small businesses and in encouraging greater small business participation by reducing the burden imposed on this community. As I stated in an August 3, 1993 hearing before the Minority Enterprise, Finance, and Urban Development Subcommittee of the House Committee on Small Business, this Administration views small and small disadvantaged business concerns "as fundamental and critical sources of supply for the Federal Government and their value cannot be overstated."

One procurement reform initiative already underway within the Executive branch which we believe will be especially beneficial for small businesses -- and which was a key recommendation of the Vice President's National Performance Review -- involves increasing the Government's reliance on electronic commerce. On October 26, 1993, the President issued a memorandum requiring the Government to implement electronic commerce for appropriate Federal purchases as quickly as possible. An explicit objective of this initiative is to provide businesses, including small, small disadvantaged, and women-owned businesses, with greater access to Federal procurement opportunities. We believe that the steps called for in the President's memorandum should help to eliminate the problems presently experienced by these concerns in the current paper-based process.

We appreciate the comments of the small business community and its interest and participation in improving Government contracting. My office remains committed to improving small business access to the Federal procurement system and to ensuring that procurement policy and regulation are consistent with this important goal.

Sincerely,



Allan V. Burman
Administrator

Enclosure



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

November 17, 1993

Mrs. Eleanor R. Spector
Director
Defense Procurement
The Pentagon, Room 3E-144
Washington, DC 20301-3000

Dear *Eleanor* Mrs. Spector:

My office has received a letter from the Small Business Legislative Council and other representatives of the small business community. It requests that I initiate action to amend portions of Part 13 of the Federal Acquisition Regulation (FAR). Copies of this letter and my response thereto are enclosed.

The letter recommends that the FAR be amended to require local posting on all procurements -- including those where offers are solicited orally -- between \$10,000 and \$25,000 for civilian agencies and between \$5,000 and \$25,000 for the Defense Department. It further recommends that the FAR be amended to specifically require that a buying activity consider offers from all responsible small business concerns.

Prior to taking action under Section 6 of the Office of Federal Procurement Policy Act, 41 U.S.C. § 405, I am asking that you promptly review the issues presented in this letter and provide me with any comments you may have. In this regard, your review should consider not only FAR Part 13, but also any provisions of FAR Part 5 germane to the comments in the letter (namely FAR 5.101(a)(2)(ii) which provides that contracting officers need not comply with the posting requirements when oral solicitations are used). Careful review of this matter is particularly important in light of the ongoing procurement reform efforts, a key aspect of which is to improve small business access to Federal contracting opportunities.

Sincerely,

Allan V. Burman
Administrator

Enclosures

Identical Letter Sent to Mr. Richard H. Hopf, III,
Ms. Deidre A. Lee

TESTIMONY OF
HARRIET R. MICHEL
PRESIDENT
NATIONAL MINORITY SUPPLIER DEVELOPMENT COUNCIL
BEFORE THE
SUBCOMMITTEE ON PROCUREMENT, TAXATION AND TOURISM
COMMITTEE ON SMALL BUSINESS
U. S. HOUSE OF REPRESENTATIVES

FEBRUARY 2, 1994

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE.

MY NAME IS HARRIET MICHEL. I AM THE PRESIDENT OF THE NATIONAL MINORITY SUPPLIER DEVELOPMENT COUNCIL (NMSDC).

OUR ORGANIZATION IS TWENTY-TWO YEARS OLD AND INCLUDES:

- . 42 AFFILIATED COUNCILS ACROSS THE COUNTRY;
- . 3,500 CORPORATE MEMBERS, INCLUDING MOST OF THE FORTUNE 1000;
- . AND MORE THAN 15,000 CERTIFIED MINORITY BUSINESSES -- BLACK, HISPANIC, ASIAN AND NATIVE AMERICAN.

OUR ORGANIZATION WAS FOUNDED BY CORPORATIONS -- WITH FINANCIAL ASSISTANCE FROM THE DEPARTMENT OF COMMERCE -- TO PROVIDE INCREASED PROCUREMENT AND BUSINESS OPPORTUNITIES FOR MINORITY BUSINESSES OF ALL SIZES.

THE FOLLOWING ARE PROGRAMS AND SERVICES PROVIDED BY THE NMSDC NETWORK:

CERTIFICATION OF MINORITY BUSINESS ENTERPRISES AFTER SCREENING, INTERVIEWS, SITE VISITS, AND CAPABILITY STUDIES:

ACCESS TO MBYSIS, A NATIONAL COMPUTERIZED DATABASE OF NEARLY 15,000 CERTIFIED MINORITY SUPPLIERS;

REFERRALS TO CORPORATE BUYERS OF MINORITY SUPPLIERS CAPABLE OF PROVIDING QUALITY GOODS AND SERVICES AT COMPETITIVE PRICES, AND IN A TIMELY FASHION;

SUPPORT IN DEVELOPING EXPANDING OR PROMOTING CORPORATE

HARRIET MICHEL/2.

PROVISION OF CONTRACT FINANCING LOANS OF UP TO \$500,000 TO CERTIFIED MINORITY BUSINESSES WHICH HAVE CONTRACTS WITH NMSDC NATIONAL AND REGIONAL CORPORATE MEMBERS, THROUGH THE BUSINESS CONSORTIUM FUND;

OPERATION OF A GOVERNMENT RELATIONS OFFICE TO PROVIDE GOVERNMENT DECISIONMAKERS WITH INFORMATION ON MINORITY BUSINESS ISSUES AND TO RESPOND TO LEGISLATIVE AND REGULATORY PROPOSALS AND CHANGES WHICH AFFECT MINORITY BUSINESS DEVELOPMENT;

DISSEMINATION, THROUGH MAILINGS AND NEWSLETTERS, OF VITAL STATISTICS AND INFORMATION PERTINENT TO THE CHANGING PICTURE OF PURCHASING;

EDUCATIONAL SEMINARS, TRAINING AND TECHNICAL ASSISTANCE FOR BUYERS AND SUPPLIERS TO ASSIST IN PERSONAL AND PROFESSIONAL GROWTH;

BUSINESS OPPORTUNITY/TRADE FAIRS WHICH ALLOW MINORITY ENTREPRENEURS TO PRESENT THEMSELVES TO MANY PROSPECTIVE BUYERS IN A SHORT TIME;

NETWORKING OPPORTUNITIES, ORGANIZED BY PURCHASING CATEGORIES, AT WHICH VENDORS SPEAK DIRECTLY TO APPROPRIATE PURCHASING AGENTS;

CORPORATE AND VENDOR DIRECTORIES, AND OTHER PUBLICATIONS;

NMSDC CONFERENCE -- THE NATION'S BENCHMARK FORUM ON MINORITY BUSINESS DEVELOPMENT;

AWARDS AND SPECIAL RECOGNITION FOR OUTSTANDING CORPORATE PROGRAMS IN SUPPORT OF MINORITY BUSINESS DEVELOPMENT, AS WELL AS FOR EXCELLENT MINORITY BUSINESSES, AND OTHER CITATIONS.

I WANT TO THANK CONGRESSMAN BILBRAY FOR THE INVITATION TO PROVIDE THE PERSPECTIVES AND FINDINGS OF NMSDC DURING YOUR DELIBERATIONS ON AN ISSUE OF CRITICAL IMPORTANCE TO MINORITY BUSINESSES AND THE AMERICAN ECONOMY AS A WHOLE.

LET ME ALSO PUBLICLY THANK YOU, CONGRESSMAN BILBRAY, FOR THE SUPPORT AND ASSISTANCE YOUR OFFICE HAS PROVIDED THE NEVADA MINORITY PURCHASING COUNCIL AS IT WORKS TO STRENGTHEN ITS PROGRAM AND RE-

HARRIET MICHEL/3.

MY TIME IS SHORT. I ASK THAT MY WRITTEN TESTIMONY BE ACCEPTED FOR THE RECORD. I WILL SUMMARIZE AND HIGHLIGHT OUR MAJOR CONCERNS.

AS YOU LOOK AT THE MERITS OF SUBCONTRACTING GOALS, AND THE ACQUISITION THRESHOLD AND THE DEFINITION OF COMMERCIAL PRODUCTS, WE ASK THAT YOU CONSIDER THE IMPACT OF YOUR DECISIONS ON THE MINORITY BUSINESS COMMUNITY.

ACCORDING TO THE BUREAU OF THE CENSUS, THERE ARE 1.5 MILLION MINORITY BUSINESSES IN AMERICA, AND THIS IS ONE OF THE FASTEST GROWING AND MOST DYNAMIC BUSINESS SEGMENTS.

MORE THAN 25% OF AMERICA'S CITIZENS ARE MEMBERS OF MINORITY GROUPS -- THAT IS, BLACK, HISPANIC, ASIAN AND NATIVE AMERICAN. MINORITY CITIZENS PAY TAXES.

BUT MINORITY BUSINESSES ACCOUNT FOR ONLY NINE PERCENT OF ALL U. S. BUSINESSES, AND FOUR PERCENT OF GROSS RECEIPTS. PURCHASES FROM MINORITY BUSINESSES REPRESENT ONLY ONE TO TWO PERCENT OF TOTAL CORPORATE PURCHASES. AMERICA'S MAJOR CORPORATIONS ARE WORKING WITH US TO BRING THOSE NUMBERS UP.

IN 1972, WHEN NMSDC WAS FOUNDED, OUR CORPORATE MEMBERS REPORTED APPROXIMATELY 86 MILLION DOLLARS IN PURCHASES OF GOODS AND SERVICES FROM MINORITY BUSINESSES. IN 1992, OUR CORPORATE MEMBERS REPORTED 20.5 BILLION DOLLARS. THESE PROCUREMENT SUCCESSES WERE ACCOMPLISHED NOT BY LOWERING PURCHASING STANDARDS, BUT BY SOURCING QUALIFIED FIRMS AND GIVING THEM BUSINESS ON A COMPETITIVE BASIS --

HARRIET MICHEL/4.

MINORITY BUSINESSES DO NOT NEED MORE STUDIES OR ADVICE OR TRAINING OR COUNSELING. THEY NEED CONTRACTS AND SUBCONTRACTS.

LOSS OF SUBCONTRACTING OPPORTUNITIES WITH THE FEDERAL GOVERNMENT REPRESENTS DISASTER FOR THE MINORITY BUSINESS COMMUNITY. THIS IS NOT ONLY BECAUSE OF THE POTENTIAL FAILURE OF MANY SMALL BUSINESSES, WHICH ARE THE ANCHORS OF MINORITY COMMUNITIES, BUT ALSO THE LOSS OF JOBS.

MINORITY SUPPLIERS ARE ALSO MINORITY EMPLOYERS. THEY HIRE AN EXTREMELY HIGH PROPORTION OF MINORITIES. INDEED, THE BENEFITS TO THE COUNTRY'S MINORITY COMMUNITY THAT PASS DIRECTLY THROUGH MBEs APPEAR TO COME FROM HIRING MINORITIES AS WELL AS PURCHASING FROM OTHER MINORITY-OWNED BUSINESSES, WHEN THEY CAN.

SMALL BUSINESS ADMINISTRATION DATA SHOWS THAT MORE THAN SEVENTY PERCENT OF JOB CREATION BY SMALL BUSINESSES OCCURS AFTER FOUR YEARS OF OPERATION. ACCORDING TO THE BUREAU OF LABOR STATISTICS, FROM 1990 TO 2005, THE LABOR FORCE IS EXPECTED TO GROW BY 26 MILLION PEOPLE (OF THESE, 27.8 PERCENT WILL BE HISPANIC, 15.8 PERCENT WILL BE BLACK AND 10.1 PERCENT WILL BE ASIAN). MANY OF NMEDC'S CERTIFIED BUSINESSES ARE WELL-POSITIONED TO CONTRIBUTE BOTH TO JOB GROWTH AND TO THE OVERALL ECONOMIC HEALTH OF MINORITY COMMUNITIES AND THE COUNTRY AS A WHOLE.

HARRIET MICHEL/5.

THERE ARE STILL MANY BARRIERS TO THE FULL PARTICIPATION OF MINORITY BUSINESSES IN THE AMERICAN ECONOMY. WHILE THE NATIONAL MINORITY SUPPLIER DEVELOPMENT COUNCIL ACKNOWLEDGES MANY GOVERNMENT INITIATIVES AT THE LOCAL, STATE AND FEDERAL LEVEL, MUCH MORE REMAINS TO BE DONE TO ASSURE ACCESS TO INFORMATION, FAIRNESS AND OPENNESS IN THE GOVERNMENT PROCUREMENT PROCESS.

NMSDC RECOMMENDS:

1). STANDARDIZATION OF TERMS AND DEFINITIONS OF ELIGIBILITY

Currently, each agency and department has its own definition of minority, small disadvantaged, historically underutilized, etc.

2). FEDERAL GOVERNMENT-WIDE PROGRAM ON SMALL AND DISADVANTAGED BUSINESS

The initiatives at DoD, NASA, and so forth could also be replicated in other non-Defense departments and agencies.

3). ABOLISH "SELF CERTIFICATION"

"Front" companies compete unfairly with legitimate minority businesses, when credentials are not checked to determine that businesses are 51% owned and operated by minorities.

4). ENFORCEMENT OF REGULATIONS IMPACTING THE OFFICES OF SMALL DISADVANTAGED BUSINESS UTILIZATION (OSDBUs) AS DESCRIBED IN PUBLIC LAW 95-507

In many cases, the OSDBU Director reports to the Procurement or Contacts Office which they are required to monitor. According to the regulations, the OSDBU Director would report directly to the Secretary.

5). CODIFICATION OF THE OSDBU'S OPERATIONS, WHICH WOULD ALLOW FOR OBJECTIVE MONITORING AND EVALUATION OF EFFORTS.

The OSDBUs Directors Group is itself developing performance measures in order to provide structure and

HARRIET MICHEL/6.

- 6). DEVELOPING A CREDIBLE, EFFICIENT MECHANISM FOR PROVIDING ACCESS TO WORKING CAPITAL FOR MINORITY BUSINESSES.

Half of the minority business owners who have been turned down for credit by commercial banks believe that racism was one reason for the bank's decision. The Community Reinvestment Act (CRA) is not working in regard to minority business loans.

NMSDC ALSO:

- 1). OPPOSES THE ELIMINATION OF SUBCONTRACTING GOALS

Two articles in The Washington Post last week underscore the need to hold contractors to a reasonable standard on including minority-owned businesses as subcontractors. On January 27th, an article described an agreement to examine the past performance of contractors (including the management of subcontractors) applying for new or expanded contracts from the more than \$200 billion flowing through the federal procurement system. On the following day, an article appeared regarding how federal agencies "devised elaborate practices of circumventing federal law so hundreds of millions of dollars in government business could go to favored companies."

Finally, no major contractor has had their contract terminated because of lack of compliance with the subcontracting provision, nor paid liquidated damages.

- 2). FINDS THE DEFINITION OF COMMERCIAL PRODUCTS TOO BROAD

A broadened definition will enable many more companies to become exempt from government requirements, like subcontracting plans.

- 3). CONDITIONALLY SUPPORTS RAISING THE SMALL PURCHASE THRESHOLD TO \$100,000

NMSDC would support this action only if there is an electronic notification system in place to ensure small and disadvantaged businesses have immediate and equal access to these procurement opportunities.

HARRIET MICHEL/7.

SUMMARY

IN CLOSING, I WANT TO SAY THAT THE ECONOMIC PLAYING FIELD IS NOT LEVEL YET. MINORITY BUSINESSES MUST BE FACTORED IN AND UTILIZED IF AMERICA IS GOING TO COMPETE SUCCESSFULLY IN THE GLOBAL MARKETPLACE.

I INCLUDE AS PART OF MY TESTIMONY A REPRINT FROM FORTUNE MAGAZINE ON MINORITY BUSINESSES AND A SURVEY OF MINORITY BUSINESSES PREPARED BY YANKELOVICH PARTNERS.

I WANT TO THANK THE COMMITTEE FOR THE OPPORTUNITY TO TESTIFY TODAY AND I WOULD BE PLEASED TO RESPOND TO ANY QUESTIONS YOU MAY HAVE.

THANK YOU, MR. CHAIRMAN.

HARRIET R. MICHEL
ORAL TESTIMONY

1

Small Business Legislative Council -- a permanent coalition of 94 associations representing small businesses in every business imaginable.

One of SBLC's key goals is assuring that small businesses are able to participate in the federal marketplace.

We can't help but be concerned when we hear President Clinton talk about how important small businesses are to the future growth of America -- and then hear his representatives develop an intricate cobweb of proposals designed to lock these small businesses out of the government marketplace.

And although the rhetoric from the OFPP Administrator and others sound pretty, at least my mother always told me that "actions speak louder than words."

And despite what you may have heard during the hearing yesterday, the proposals for procurement reform being put forth by the Clinton Administration will -- and we believe are designed to -- lock small businesses and small disadvantaged businesses out of the federal marketplace. Is this what the President means by putting people first?

2

Let me make clear that SBLC and its members believe in and support procurement reform.

However, we believe that acquisition streamlining must benefit the seller as well as the buyer.

We can't help but be concerned that almost everything to date indicates that the Clinton Administration has a strong buyer bias. Is this what President Clinton means by putting people first?

Our written statement describes our key issues in detail and how they relate to the individual pieces of legislation on the table.

The Conyers-Clinger amendment to H.R. 3400 -- a rewrite of H.R. 2238 -- probably comes closest to recognizing the needs of the small business community. Nonetheless, we have a substantial list of items that need to be improved even in that bill.

3

Perhaps the issue with the most profound and immediate impact is the proposal by the Administration to raise the small purchase threshold without simultaneously implementing electronic contracting -- thus leaving 98 percent of the contract business opportunities cloaked in an impenetrable shield that would make the developers of stealth technology envious.

Let's make clear -- what we have here is a fight over advance notice and the time to shape an offer.

Failing to give adequate notice -- or an inadequate time to respond -- renders meaningless the requirements for open competition. Because if you don't know until the last second what a customer wants to buy and you're given only 48 hours to put together a bid -- the fact that any eligible offeror is allowed to bid is an empty promise.

4

The Congress addressed this in 1984. That law said that for contracts above the threshold -- than \$10,000 -- that companies would have at least 15 days notice of the release of the solicitation and that they would have 30 days to respond except for R&D.

The procurement bureaucracy opposed the Competition in Contracting Act because it opened the system to real competition. Now we're now seeing the effort to role that back.

We're told that they will provide reasonable times for advance notice --- and they will give you a reasonable time to respond.

Their definition of reasonable is what prompted Congress to enact fixed times in 1984.

And that's why in 1986 -- when Congress raised the threshold from 10,000 to 25,000 -- the small business community insisted upon the posting of those requirements and the opportunity of 10 days to respond.

5

Ms. Preston waxed poetic yesterday with her description of the local posting system -- and the difficulties that small businesses have with it.

She apparently just forgot to tell you that the procurement bureaucracy created a regulatory repealer of that law by including in the Federal Acquisition Regulation a provision urging that contracting officers use oral solicitations -- and creating an exemption from the posting requirement if the solicitation is made orally.

No matter how closely we read this law we can't find the exemption for oral solicitations -- obviously, Congress wrote that provision in special ink only visible to the regulation writers.

6

12 associations representing small businesses and small disadvantaged businesses pointed out this inconsistency between the law and the regulations in a letter to the OFPP Administrator in June of last year.

It took the OFPP Administrator five months to even respond to that letter. The OFPP response -- which is attached to our statement -- merely served as a transmittal of a letter to the other members of the FAR Council asking for their opinion.

Another two months have passed and still we've received no substantive answer from OFPP. -- Still another apparent example of putting people first.

The fact is that what the Administration is proposing is to roll back to the pre-1984 unbridled discretion -- with the excuse that they're just small purchases. That they're too burdensome. That it's just too difficult to administer purchases or \$100,000 or less.

7

Mr. Chairman, I suspect that your constituents -- most of whom take several years to even earn \$100,000 -- would be distraught to learn that the government considers the spending of tens of thousands of purchases at \$100,000 a pop just not really important.

The fact is that under the Administration's proposal -- these small purchases are simply going to disappear from the screen.

They won't even give us the assurance of an electronic system in which they can't hide, they can't camouflage, they can't refuse to take the fourth offer.

Instead, they will simply be able to call three people -- two of whom they know can't perform and the one they have decided in advance they want to award the contract to -- And there will no record of what happened.

8

Yesterday, Ms. Preston made an impressive presentation on how much time it takes to award an acquisition -- ranging from 26 days for small purchases to nearly a year for larger ones.

Once again, however, she failed to mention that only 45 days is driven by statute. -- If she and her colleagues wanted to, most of the rest of that time could be substantially reduced tomorrow.

Instead, the Administration wants to limit the relatively short periods of time it takes to assure competition. -- Another obvious example of putting people first.

9

Let me give you just one more example of only half a story being presented during yesterday's hearing.

Yesterday Ms. Preston cited that if the government sets up a new office, they have to wait 26 days just to get basic office supplies. That is a falsehood.

DoD runs self-service supply centers, similar to those GSA runs for the rest of the government, in which even the humblest of GS'ers can walk in and get any routine office supplies, just as you would if you were walking through Staples.

10

But the proposals would not merely eliminate small businesses from being able to effectively pursue so-called \$100,000 small purchases, they also would be eliminated from the potential of participating as subcontractors and suppliers on the major systems contractors on which they are clearly unable to serve as the prime contractor.

In its single meeting held with the small business community, the Administration said that its objective is to eliminate subcontracting plans for commercial items.

The members of the so-called Acquisition Reform Working Group propose to add all commercial services -- which means all services to the definition of commercial items.

Therefore, if you eliminate subcontracting plans for commercial items and commercial services, you have essentially effected a repeal of the requirement to use small business or small disadvantaged business in the performance of government contracts funded by those very small businesses.

We find this rather hard to understand. We hope the committee will as well.

11

As reflected in my written statement, there seems to be a certain incongruity advocated by the Acquisition Reform Working Group -- and the willingness of at least of its large members, to provide generous offsets when they seek to market their products to foreign customers.

They are willing to furnish to the country buying the major system a requirement that major components will be manufactured in the country buying the product with the assistance of the major systems contractor seeking to make the sale.

Simply put, these companies have no problem and will seek to out bid each other in exporting American manufacturing jobs to foreign customers willing to purchase their systems.

12

The subcontracting plans mandated by 95-507 merely seek to provide for the participation of American small business concerns.

Unfortunately, unlike foreign offset requirements, the use of American small business concerns -- and here I include without question disadvantaged small business concerns -- is not tied to the very basic decision of who will receive the contract.

If the Administration wants to harness the most effective incentive, they will make small business participation and disadvantaged business participation an element of the contract award decision process.

The problem with subcontracting plans is not that they operate as an inhibitor on the participation of major prime contractor but rather they are an afterthought to be gotten around to after the contract is awarded.

13

Let me give you just one more example of the extremes to which the Acquisition Reform Working Group would seek to carry the Congress in its frenzied quest for commercial buying practices.

It proposes to waive virtually all restraints on business behavior which traditionally have been considered unacceptable in the government procurement arena.

For example, they would eliminate any restrictions on the providing of gratuities -- that is, bribes -- to government contracting officers.

While many of the firms advocating this have been caught bribing foreign officials to win contracts, I think that most members of this committee -- and most certainly most members of the American public, including at least the small businesses that I represent -- would not want to see these practices applied in the United States.

14

In closing, let me again say that SBLC strongly supports acquisition reform.

But we don't want to be shut out of the market.

To a large extent the major contractors -- are seeking to shut us out for the very reason they identify as the need for procurement streamlining -- declining budgets.

If the pie is smaller, they want to make sure they get more and we get less.

Unfortunately, it appears that the Clinton Administration is of the same mind.

If we're wrong with regard to the Clinton Administration, we await their specific and precise proposals to advance rather than retard the opportunities for small firms and especially small disadvantaged firms, as well as women-owned businesses, to become more prominent players than they are today.

15

The Acquisition Reform Working Group says that we must eliminate the inquisitional mentality between government and its major contractors and it should be replaced by mutual trust.

This could be called into question when one considers that virtually all of the major systems contractors and major prime contractors have admitted procurement fraud during the last decade.

I would like to submit for the record a set of newspaper clippings assembled by a contractor in Connecticut.

I think they serve as an appropriate character reference for the contractors in which Dr. Kelman suggests we should place our trust.



STATEMENT OF PAUL J. SEIDMAN
ON H.R. 2238, H.R. 3586 AND S. 1587
BEFORE THE
U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON SMALL BUSINESS
SUBCOMMITTEE ON PROCUREMENT, TAXATION AND TOURISM
FEBRUARY 2, 1994

Mr. Chairman and Members of the Committee.

My name is Paul J. Seidman. I am an attorney in private practice with the McLean, Virginia firm of Seidman & Associates, P.C. I am appearing today on behalf of the Independent Defense Contractors Association (IDCA) at these hearings on H.R. 2238, 3586 and S. 1587.

IDCA represents domestic small businesses that supply replacement parts for DoD weapon systems. Since competition was mandated by 1984 legislative reforms, small business manufacturers have provided DoD with high quality spare parts at a fraction of the prices previously paid to the OEMs. As a result, DoD and the taxpayer have saved billions of dollars.

These small businesses are our domestic manufacturing capability. The so-called large "original equipment manufacturers" (OEMs), for the most part, are "assemblers," "dealers" or "importers" rather than manufacturers. OEMs purchase parts manufactured by others and assemble them into weapon systems or resell them as replacement parts.

Until recently OEMs purchased the parts from domestic small business manufacturers. As the result of offset agreements and other arrangements, OEMs are increasingly purchasing parts abroad.¹ This trend has negative implications for our economy

¹ "Critics Charge Big Defense Contractors are Exporting U.S. Jobs", *SAM Trade*, May/June 1993; Robert Weisman, "Jet Engine Work Landing Abroad - A Special Report: Pratt & Whitney Growing Globally/Shrinking Locally", *The Hartford Courant*, April 18, 1993, page 1; See also "Cover Story - GE's Brave New World: Welch Sees the Future. It's China, India, Mexico", *Business Week*, October 8, (continued...)

and ability to surge production to respond to crisis.

IDCA VIEWS ON H.R. 2238, H.R. 3586 AND S. 1587

IDCA applauds Congressional efforts to reform military acquisition processes. H.R. 2238, H.R. 3586 and S. 1587 are based on the recommendations of the Advisory Panel on Streamlining Defense Acquisition Law (§ 800 Panel). Unfortunately, small business manufacturers, despite their pivotal role in the defense industrial base, and as providers of jobs, were not represented on the § 800 panel.

IDCA's views on the various legislative proposals are set forth below.

I. Intellectual Property

A. Patents

S. 1587 would require the Federal Acquisition Regulation (FAR) to set forth circumstances under which a contracting officer could withhold authorization and consent to use a patent in the performance of a Government contract. If authorization and consent are withheld, an OEM could sue a competitor they allege is using their patent in the performance of a Government contract for damages.

This provision is (1) unnecessary to protect the rights of patent holders and (2) highly noncompetitive.

Under 28 U.S.C. § 1498, as presently enacted, a patent holder is entitled to recover "just compensation" from the

¹ (...continued)
1992, page 64; "China: Head East-And Gun the Engines", *Business Week*, October 8, 1992, page 67.

Government if another contractor uses its patent in the performance of a Government contract. The patent holder cannot sue the competing contractor directly. The Government can shift the cost of patent infringement to the competing contractor by patent indemnification clauses such as FAR § 52.227-3.

Permitting OEMs to sue competitors that may be using their patent in the performance of a Government contract is anticompetitive. Small businesses will not bid on Government contracts if faced with the possibility of defending suits for patent infringement. By making even a spurious threat of patent infringement, an OEM could eliminate competition and assure itself of lucrative noncompetitive awards.

The return to costly, noncompetitive purchases from the OEM that would result is not in the best interests of the overburdened taxpayer. Under present rules, any costs borne by the Government are offset many times by the substantial savings resulting from competition.

B. Technical Data

In an attempt to regain spares business lost to more efficient small business manufacturers, OEMs have been lobbying to amend the legislative proposals to treat more unpatented technical data as proprietary.

For example, under the DoD/Industry Technical Data Advisory Committee (§ 807 Committee) proposal, which the OEMs urge Congress to legislatively adopt:

- data rights would be determined based upon whether development is charged to DoD as a direct or indirect

charge, rather than whether it is paid for by DoD. An OEM could treat development paid for by DoD as proprietary, and preclude competition by charging it to the taxpayers as an indirect rather than a direct expense;

- an OEM could obtain exclusive rights to commercial use of development paid for by DoD, by paying as little as \$1 of development costs itself or charging it to DoD as an indirect expense.

The Congress should resist OEM efforts to tack on a technical data provision to these legislative reforms. In reality the OEMs are not as concerned with preserving rights in cutting edge technology as they are in regaining the spares/replacement part market lost to more efficient small business manufacturers.

The OEMs lobbied to have the legislation creating the § 807 Committee enacted after DoD rejected their so called "Unified Industry Recommendations" on data rights. The OEMs packed the Committee with their supporters. They also heavily lobbied the Bush and Clinton Administrations to force Government members to depart from their stated views and give them greater rights in data.

The § 807 Committee and other OEM technical data initiatives are a disguised effort by the OEMs to obtain Government protection from the rigors of competition. The OEMs have not

been as subtle when alone with friends in the Government. As stated in a "Value Added Study" prepared by Pratt & Whitney and some Air Force buyers at Tinker Air Force Base:

The DoD Spare Parts Breakout Program has been highly successful, so much so that growing concerns have developed about taking breakout too far. When we talk about breaking out fracture critical parts and we begin to receive feedback from our prime contractors that they may not be able to support our efforts in the future, it is time to assess our priorities from a realistic approach. . . .²

The OEMs' concerns are unjustified. Both the OEMs and small business manufacturers have survived with each doing what they do best. DoD has had the advantage of the OEMs engineering capabilities while reaping the benefit of more efficient (lower cost) manufacture by small business suppliers. There is simply no reason to believe that small business suppliers pose a threat to the OEMs.

For a complete discussion of the § 807 Committee recommendations see the December 17, 1993, Minority Report of IDCA President Nick Reynolds who served on the Committee. A copy of the report is appended to this testimony for the record.

II. Commercial Items

The § 800 Panel and proponents of the proposed legislation contend changes are necessary for the Government to purchase commercial items and encourage dual use technology. This makes some sense where the Government is buying commercial items such

² The "Pratt & Whitney Value Added Study" was obtained by an IDCA member as the result of a FOIA appeal. The FOIA request was originally denied in its entirety by Tinker Air Force Base on grounds that the study was proprietary to Pratt & Whitney.

as foodstuffs or office equipment. It does not necessarily follow where procurements are for weapon systems design rather than the purchase of a refrigerator from the Sears Roebuck catalogue.

A. The Proposed Definitions of Commercial Products are Too Broad

The initial problem is that the definition of commercial product in all of the proposed bills is too broad. It includes not only items that have been sold commercially, but also those which might (or *might not*) be sold commercially in the future.

IDCA submits that since the exemption from regulatory protections is based on commercial acceptability and established commercial pricing, commercial products should be limited to those which have been sold to the general public in substantial quantities.

B. A Preference for Commercial Products Should Not Limit Competition

We are also concerned because a preference for purchasing commercial items in the proposed legislation would override the Competition in Contracting Act and justify noncompetitive procurements where competition could be achieved by using Government specifications.

Commercial products are not a panacea. Whether commercial products best satisfy the Governments needs should be determined on a case by case basis.

We would therefore recommend, consistent with the recommendations of the \$ 800 panel, to permit companies

manufacturing products to Government specifications to compete on equal footing with those offering commercial products.³

C. **OEMs Should Not Be Able to Avoid Competition By Designing Weapon Systems With Commercial Components**

H.R. 3586 and S. 1587 would require OEMs to incorporate commercial components in weapon systems design.

IDCA recommends that these provisions not be enacted. Such provisions would be license for an OEM to assure itself of lucrative, noncompetitive replacement parts contracts for the weapon system by specifying its own proprietary commercial components.

These provisions are contrary to 1984 legislative reforms which require "proposals to incorporate in the design of a major system items which the United States will be able to acquire competitively in the future."⁴ According to the Conference Report, such reform legislation was enacted because "one of the keys to solving the problem of excessively priced spare parts is to assure that the United States will be able to reprocur such items competitively."⁵

D. **Commercial Products Should Not Be Exempted from the Buy American Act and Small Business Subcontracting Requirements**

We also urge the Committee to resist those who would expand the laws from which commercial products are exempted to include

³ § 800 Panel Report, ¶ 8.3.1.7.

⁴ P.L. 98-525, § 1213, 10 U.S.C. § 2305(d)(1)(B)(ii).

⁵ Conference Report to Accompany H.R. 5167, House Report 98-1080, 98th Congress 2d. Sess. at p. 318 (1984).

the Buy American Act and Small Business subcontracting.

If these protections are eliminated, OEMs will accelerate their efforts to have work performed abroad in order to meet offset agreements and other arrangements. This will result in a loss of U.S. jobs and the small business manufacturers, which, as discussed above, are our domestic manufacturing capability.

E. OEMs Should Not Be Exempted from the Requirements to Identify Suppliers or the Prohibition on Limiting Subcontractor Direct Sales

S. 1587 would exempt OEMs supplying a commercial or nondevelopmental item from the statutory requirements to identify the actual manufacturer of the part⁶ and the prohibition on limiting subcontractor sales to the Government⁷.

These provisions, from which commercial or nondevelopmental items would be exempted, were enacted as part of 1984 legislation intended to end OEM spare parts abuses.⁸ IDCA opposes these exemptions because they would foster the return of OEM spare parts abuses.

III. Simplified Acquisition Threshold

We do not oppose raising the threshold for the synopsis of proposed procurement actions to \$100,000 as long as it is linked with computerized advance notice requirements as those set forth in H.R. 3586.

The dollar limit for the nonmanufacturer rule, which applies

⁶ 10 U.S.C. § 2384.

⁷ 10 U.S.C. § 2402.

⁸ P.L. 98-525, §§ 1231, 1234.

to contracts under \$25,000, should not be increased. Under the nonmanufacturer rule, which is currently limited to purchases of less than \$25,000, a small business dealer can satisfy small business set-aside requirements by providing the product of a large manufacturer.

IV. Other Legislative Provisions

A. Procurement of Critical Aircraft and Ship Spare Parts

IDCA supports the repeal 10 U.S.C. § 2383 as set forth in S. 1587. 10 U.S.C. § 2383 requires DoD to use the same qualification criteria as those used for the OEM for the original production part.

10 U.S.C. § 2383 enables an OEM to avoid competition by using unduly restrictive qualification criteria for the original production part. It is therefore unduly restrictive of competition and compromises the integrity of the procurement system.

10 U.S.C. § 2383 is also unnecessary. As stated by the § 800 Panel in recommending repeal:

There is adequate authority in the procurement process without the necessity of a statute. The qualification and quality standards should be a matter for engineering and technical judgment based on current needs, technology, and experience with the use of the item or part.⁹

B. Prompt Notice of Award and Debriefings

IDCA supports provisions in the proposed legislation requiring prompt notice of award and debriefings.

⁹ § 800 Panel Report, ¶ 2.5.2.4.

C. Costs and Fees in Settlement of Protest

H.R. 3586 would require protesters to pay agency costs where GAO determines a protest to be frivolous. S. 1587 would limit attorneys fees awarded to successful protestors at GAO or the GSEBCA to the Equal Access to Justice rate of \$75.00 per hour, a fraction of the going rate for Government contracts counsel.

IDCA recommends that these provisions not be enacted. They are contrary to the public interest because they discourage private parties from filing protests to enforce agency compliance with competition requirements.

IDCA also recommends that successful protesters in Federal Court be able to recover their reasonable attorney fees and not be subject to the Equal Access to Justice Act fee cap currently imposed. This recommendation is consistent with the Private Attorney General concept underlying the CICA bid protest provisions.

CONCLUSION

The \$ 800 panel recommendations underlying the various legislative proposals reflect the absence of input from the small business manufacturers that constitute our domestic manufacturing capability. If the proposed legislation implementing the \$ 800 panel recommendations is enacted in its present form, it will result in a loss of U.S. jobs and manufacturing capability.

This concludes my statement. If you have any questions, I would be happy to address them.



Statement of the U.S. Chamber of Commerce

ON: PROCUREMENT REFORM

**TO: SUBCOMMITTEE ON PROCUREMENT,
TAXATION AND TOURISM OF THE
HOUSE COMMITTEE ON SMALL BUSINESS**

DATE: FEBRUARY 2, 1994

BY: VICTORIA BONDOC

The U.S. Chamber of Commerce is the world's largest federation of businesses and associations and is the principal spokesman for the American business community. It represents more than 215,000 businesses and organizations, including 3,000 local and state chambers of commerce, 1,200 trade and professional associations, 68 American Chambers of Commerce abroad, and 11 bilateral international business councils.

More than 96 percent of the Chamber's members are small businesses with fewer than 100 employees, 71 percent of which have fewer than 10 employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business -- manufacturing, retailing, services, construction, wholesaling, and finance -- numbers more than 10,000 members. Yet no one group constitutes as much as 32 percent of the total membership. Further, the Chamber has substantial membership in all 50 states.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the 68 American Chambers of Commerce abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. Currently, some 1,800 business people participate in this process.

TESTIMONY
on
PROCUREMENT REFORM
before the
HOUSE SUBCOMMITTEE ON PROCUREMENT, TAXATION AND TOURISM
of the
HOUSE COMMITTEE ON SMALL BUSINESS
FOR THE U.S. CHAMBER OF COMMERCE
by Victoria Bondoc
February 2, 1994

Good morning, Mr. Chairman and members of the committee. I am Victoria Bondoc, testifying on behalf of the U.S. Chamber of Commerce, the world's largest federation of business companies and associations. The Chamber represents more than 215,000 businesses, 3,000 local and state chambers of commerce, 1,200 trade and professional associations, and 68 American Chambers of Commerce abroad. I am the President and CEO of Gemini Industries, a small defense contracting company which I started in 1986.

The Chamber has been active in procurement reform efforts for a number of years. More than 96 percent of the Chamber's membership are small companies with fewer than 100 employees, 71% of which have fewer than 10 employees. A substantial number of the Chamber's members, large and small, are active in the federal procurement market. The Chamber is also a member of the Acquisition Reform Working Group, a coalition of industry associations which is also testifying today.

Chamber members are very encouraged by the attention the issue of procurement reform has received this year by the Clinton Administration and Congress, which has

introduced three bills on the subject: this Committee's bill, H.R. 3586; the Conyers/Clinger bill, H.R. 2238, and the Senate bill, S. 1587. We think the time is ripe for major changes in the government's procurement system to provide more opportunities for all interested companies, particularly small companies, to participate in this important market.

My company, Gemini, provides technical and management consulting services to the Department of Defense (DOD), the Department of Transportation, and a variety of other government agencies as well as private industry. The company has grown over the years to over 100 employees at offices in Massachusetts, upstate New York, and northern Virginia, supporting contracts valued at more than \$13.5 million dollars.

I started Gemini because I wanted to run a company that would be both supportive of the needs of employees and innovative in performing work to enable the government to operate more effectively. We specialize in helping organizations initiate and manage change. For this reason, I am particularly excited and pleased to be a spokesperson for the Chamber on the government's efforts to reinvent itself and to change the federal procurement system.

The Chamber has identified four key areas of procurement reform that are of particular interest or concern to our small business members: 1) creating a simplified acquisition threshold at \$100,000, while linking Commerce Business Daily notice to the implementation of electronic notice and eventually an electronic data interchange system; 2) improving government debriefings to ensure that companies obtain meaningful information as to why

they did not win a contract; 3) addressing prompt payment problems faced by small businesses; and 4) raising the threshold for submission of cost and pricing data to the government.

Changes in these areas in particular would address some of the major obstacles small businesses face in trying to break into the government market — obstacles such as the difficulty in identifying contracting opportunities; establishing open and adequate communications with contracting offices; payment problems; and unnecessary or overly burdensome recordkeeping and paperwork requirements.

Just being a small business is an obstacle. You have to be determined and disciplined about satisfying the multitude of rules and procedures that go along with government contracting to have any hope of succeeding in this business. To obtain a contract, you must prepare a detailed proposal addressing specified and at times conflicting requirements, document cost estimates at the unit and aggregate level, together with indirect cost estimate projections two to five years in the future, and complete numerous representations and certifications. This is not necessarily hard to do, but it is very time-consuming. After contract award, cost tracking and accounting systems, security programs and contract administration procedures must be established. These involve a tremendous amount of labor hours.

An area which has the potential to help small contractors is the proposal to create a new simplified acquisition threshold which would set the small business reserve at \$100,000. To ensure that small businesses continue to receive adequate notice of small business contracting opportunities, the Chamber supports language which: (a) retains the Commerce Business Daily threshold at \$25,000 for contracting activities that do not provide electronic notice to industry, \$50,000 for contracting activities that have implemented basic electronic bulletin board capabilities for all contracting, and \$100,000 for contracting activities that have implemented full electronic data interchange (EDI) capabilities; (b) requires the Comptroller General to monitor and report on the effect of the increased thresholds on small businesses; and (c) authorizes the Office of Federal Procurement Policy Administrator to direct the implementation of electronic commerce government-wide. We also strongly advocate full implementation of current laws requiring posting and other procedures to encourage small business participation under the threshold.

We believe these steps are a small price to pay for raising the small purchase threshold. A key recommendation of the Administration's National Performance Review is to implement electronic data interchange government-wide. The Chamber believes that the government should redouble its efforts and resources devoted to making a compatible, harmonized and user-friendly EDI system the norm in government agencies. This is a necessary step to ensure that the Administration's "information highway" will truly benefit small businesses.

Much work also needs to be done in the area of debriefings. Debriefings should be mandatory, and should provide meaningful information relating to why a company did not win a contract. A debriefing should be a learning opportunity, particularly for small companies. This would alleviate the need to institute a protest -- assuming a small business could afford to do so -- for the purpose of obtaining such information.

My company was involved in a debriefing recently that gave us no useful information. Despite numerous requests for specifics, the government official involved did not identify any aspect of our proposal that was incorrect, weak or deficient. In our view, by not providing meaningful information, the government misses a prime opportunity to assist businesses, particularly small businesses, in learning how to do things better the next time around.

For this reason, the Chamber supports the provision in H.R. 3586 and in the other two bills requiring regulations that set criteria for entitlement to a debriefing; require debriefings very soon after the date of award; and require that debriefings address the strengths and weaknesses of the debriefed offeror's proposal in greater detail.

Another area of great concern to small businesses are the prompt payment rules. On occasion, payments to Gemini from the government have been delayed by six months. These events depleted our credit lines and nearly put us out of business. These kinds of payment problems are common for small businesses and need to be addressed either in this legislation or in a separate bill.

The Chamber also strongly supports the provision in H.R. 3586 and in the other two bills which would set the dollar threshold for providing cost and pricing data to the government at \$500,000. This would help contractors of all sizes cut down on the labor hours required to provide this data, and would also be a meaningful paperwork reduction measure.

I would also like to point out government programs which have been helpful to small business contractors and small disadvantaged contractors in the federal procurement market.

First, many of the small business offices at the various government agencies are very helpful. There are some small business offices that go out of their way to help small businesses identify contracting opportunities in the agency at a very early stage. There are also people at those offices who refer countless large businesses to small businesses for teaming purposes. These kinds of efforts by government personnel are invaluable, and are very much appreciated by small contractors trying to break into this business.

In addition, the Small Business Administration's (SBA) 8(a) program for minority and disadvantaged contractors is a good program. With the assistance of the 8(a) program, Gemini continues to grow. It is important to have one place in the government that is devoted to the needs of minority small businesses.

For a contractor to be successful in the 8(a) program, however, takes a lot of hard work. Some people think that the SBA hands out work to 8(a) firms. That is not the case. Minority businesses must aggressively identify contracting opportunities using tools such as the Commerce Business Daily and by face-to-face discussions and presentations to government agencies. Minority contractors must also ensure that they understand the 8(a) system rules and procedures thoroughly; the objectives of the government officials that are responsible for the program; and the technical and contracting aspects of the potential government customer.

Both H.R. 3586 and the Senate bill, S. 1587, recommend that agencies be able to contract directly with 8(a) companies, unless the company requests that the award be made through the SBA. Direct award to a small business would clearly facilitate and simplify the contracting process. But there needs to continue to be technical support to the 8(a) firm to ensure that a minority business upon graduation can continue to thrive as an organization. SBA should use the resources previously involved in the contracting process to continue to support the development of 8(a) firms as organizations which will soon have to compete in the open marketplace.

I would also like to address the issue of commercial products. The Chamber has long believed that good public policy necessitates greater use by the government of commercial products. This will help the government reduce its acquisition costs, and will also help to integrate the defense and commercial markets. The government officials I have been dealing

with over the past eight years want to buy commercial products, and have tried to find ways within the existing rules and regulations to do so. Amending these rules to make it easier and imperative for government officials to buy more commercial products is a necessity whose time has come. The Chamber supports needed legislative changes to facilitate government purchasing of commercial products, as well as increased support for small business opportunities in this area.

Finally, the Chamber strongly advocates making the changes proposed in the procurement reform bills government-wide, so that contractors will not have to deal with different procurement systems and rules for different agencies within the government. Again, this will cut down on the volume of rules that small business contractors need to address.

Thank you again for the opportunity to testify before you on this very important subject. We look forward to working with you over the coming months to secure real, comprehensive improvements to the federal government's acquisition system.



LATIN AMERICAN MANAGEMENT ASSOCIATION

TESTIMONY OF

MR. ERVIN TORREZ

on behalf of

THE LATIN AMERICAN MANAGEMENT ASSOCIATION

before the

COMMITTEE ON SMALL BUSINESS

SUBCOMMITTEE ON PROCUREMENT, TAXATION AND TOURISM

FEBRUARY 2, 1994

Thank you, Chairman Bilbray and members of Small Business Procurement, Taxation, and Tourism Subcommittee for this opportunity to present testimony before you today.

I am Ervin Torrez, President and Chief Executive Officer of Computer Resources Management, Inc., an Hispanic small and disadvantaged business (SDB), and Chairman of the Latin American Management Association (LAMA). LAMA is a national trade association which serves the Hispanic Community by promoting the interests of the Hispanic business community and opening new markets for Hispanic business in both the public and private sectors.

LAMA will focus its limited comments on S. 1587. LAMA is deeply concerned about certain provisions in S. 1587 which would take small and minority business participation in the Federal acquisition system back twenty years. Among these provisions of concern to LAMA are: (1) a delinking of the simplified acquisition threshold and an electronic data interchange requirement and (2) a broadening of the already broad definition of "commercial products".

Unlike the provisions in H. R. 2238, LAMA believes that one of the serious shortcomings of S. 1587 is the lack of an electronic data interchange statutory requirement in the streamlined simplified acquisition system. Despite the intent to leave the Executive branch with the maximum discretion in establishing and designing such a system, LAMA remains unconvinced that collaborative efforts by the agencies will be completed in an effective and efficient manner. Small and minority businesses thereby will suffer the consequences through lost opportunities.

The proposal in S. 1587 to eliminate subcontracting requirements for commercial items poses several threats to small and small disadvantaged businesses. The inclusion of Section 800 Panel's proposal to free suppliers of "commercial items" from subcontracting requirements in S. 1587 raises doubts as to the Government's stated commitment to small and small disadvantaged business contained in Section 8(d) of the Small Business Act, i.e., "[I]t is the policy of the United States that small business concerns, and small business concerns owned and controlled by socially and economically disadvantaged individuals, shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency..."

The government prime contractor community has long advocated the elimination of current subcontracting plan requirements, under the rubric that such requirements impede the effective and efficient operations of their businesses. It is ironic then that, in the true commercial items arena, unquestionably commercial businesses, such as IBM, Kodak and General Motors, have been successful in operating under small and small disadvantaged subcontracting plans, integrating these businesses into their supplier base and even winning awards for their high levels of small and small disadvantaged business participation. The government prime contractor community is not willing to make the effort to integrate small businesses and especially small disadvantaged business into their subcontractor and supplier base and the Section 800 Panel and S. 1587 are validating their actions.

The elimination of subcontracting requirements for commercial items poses another serious problem for small and small disadvantaged businesses when coupled with contract bundling - the consolidation of purchases into ever larger and more diverse procurement opportunities. With little hope of winning such large and diverse solicitations, the small and small

disadvantaged business community is pushed further out of the government marketplace. In efforts to ameliorate this elimination from one side of the government market, procuring agencies have directed small and small disadvantaged businesses to the subcontracting market, due in large part to the subcontracting requirements. With the subcontracting door now being inched closed, the small and small disadvantaged business community will once again be confronted with lost business opportunities, lost employee jobs and lost growth potential.

Lastly, LAMA is concerned about the extremely broad definition of "commercial products" contained in S. 1587 and the reports we have continued to hear of Administration's efforts to expand that definition. Of particular concern to LAMA is the inclusion of some services within the definition of commercial products. "Installation services, maintenance services and repair services", currently in S. 1587's definition of commercial products, generally might be construed to be associated with the acquisition of commercial products. The inclusion of "training services and other services if such services are procured for support of" a commercial item are not. S. 1587's definition of commercial products is already too broad and limitation rather than broadening the definition is called for. LAMA would suggest, as an alternative, examination of OFPP Letter 80-5 for a practical and workable definition of commercial products.

Thank you once again for the opportunity to present our views on S. 1587 and H. R. 2238. I would be pleased to answer any of your questions.

STATEMENT BY

ALAN CHVOTKIN
SUNDSTRAND CORPORATION

ON BEHALF OF THE
ACQUISITION REFORM WORKING GROUP

BEFORE THE

SUBCOMMITTEE ON PROCUREMENT
SMALL BUSINESS COMMITTEE
HOUSE OF REPRESENTATIVES

FEBRUARY 2, 1994

INTRODUCTION

Mr. Chairman, my name is Alan Chvotkin. I am the Corporate Director of Government Relations and Senior Counsel for Sundstrand Corporation. Sundstrand, with our headquarters in Rockford, Illinois, is an international market leader in design, manufacture and sale of a variety of proprietary, technology-based components and subsystems for aerospace and industrial markets.

Thank you for the invitation to testify on the imperative for significant acquisition law changes in this session of Congress. Today, I am pleased to testify on behalf of nine associations which have formed the "Acquisition Reform Working Group." These organizations are listed on the facing page of my statement. Together, we represent tens of thousands of companies and individuals the overwhelming majority of which are small business, majority and minority-owned businesses, companies which do business with the Department of Defense only, with the civilian agencies only, and with both. We also have members of all sizes who refuse to do business with any federal agency, in part because of the very acquisition laws which we will be focusing on during your hearings.

In today's environment of reduced budgets, particularly in defense, we can no longer afford the countless, non-value added requirements which burden the current system. These burdens limit the government's buying power, limit the pool of potential suppliers by deterring thousands of firms from doing business with the government, and jeopardize the financial health of those who are willing to contract with the United States. The time is ripe to overhaul the present system and greatly simplify and streamline it. As an industry subjected to the current acquisition process, we have called for, and strongly supported and worked for, changes to it.

We compliment you for taking the initiative to introduce your own reform proposal (H.R. 3586) at the end of the last session of Congress. We have had a chance to review the bill in detail and in my statement, I will be discussing many of the issues of concern to us which are covered in your bill. On balance, we believe you have introduced an excellent bill applicable to the Department of Defense which, with selected amendments, could become a foundation for prompt House action on government-wide procurement reform.

In addition, we have reviewed the November 1993 amendment in the nature of a substitute to H.R. 2238, which was ordered reported by Congressmen Conyers and Clinger, the Chairman and Ranking Member of the Government Operations Committee. This November proposal also is an excellent foundation for comprehensive reform. In fact, it appears that several provisions in your bill are identical to those in Conyers/Clinger, many of which we strongly support; other provisions in Conyers/Clinger, we believe, need some modifications. In some areas of coverage, your bill is better than any of the

other alternatives; in others, we prefer the formulation adopted by Conyers/Clinger or by others.

It will be very difficult, even in this lengthy written statement, to compare and contrast each of the major elements in these proposals. However, representatives from the Acquisition Reform Working Group have met at length with your staffs to discuss our position on each of these proposals in greater detail, and to answer questions about our own detailed recommendations.

Therefore, we look forward to the necessary continuation of that dialogue as we jointly support prompt Congressional enactment of comprehensive reform of the acquisition laws.

Each of the organizations in the Acquisition Reform Working Group strongly supported Congressional enactment of legislation creating the DoD Advisory Panel on Streamlining and Simplifying the Acquisition Laws, the so-called "Section 800" Panel. We worked closely with that Panel as they reviewed the 800 plus laws affecting only the Department of Defense's acquisition system and made recommendations for change. We submitted over thirty detailed letters to that Panel, on a wide range of issues of importance to them and to us. We endorse many of the final recommendations that the Panel made last January in their final report.

Last year, as part of the Defense Authorization Act, many of the obsolete or service-unique provisions were either consolidated, amended or repealed. Obviously, a lot more can be done to build on the work of the Section 800 Panel, even if it affects only the Department of Defense. In response to your request, also attached to my statement is a copy of a statement from CODSIA (the Council of Defense and Space Industries Associations, representing nine organizations) commenting on the final recommendations of the Section 800 Panel.

Finally, our discussions with you and the staffs of interested House and Senate committees last year and this have also centered, in part, on variations of legislation introduced in the Senate by Senator Glenn and others (S. 1587). We understand that you, the Administration and others have focused on that legislative proposal, as well. Last November 16, we responded to a request from the Senate Armed Services Committee for comments on S. 1587. Our November 16, 1993 letter to Senator Nunn detailing our comments on S. 1587 is included in our January 19 report and included as an attachment to my statement, as well.

TEN AREAS OF NEED FOR ACQUISITION REFORM

In addition to the topics covered by the various legislative proposals which are pending before Congress to streamline and simplify the acquisition process, and the excellent set of recommendations from the so-called "Section 800 Panel", our Acquisition Reform Working Group developed its own detailed list of recommendations for change to the current acquisition system that in some cases goes beyond what is contained in any of the other proposals. Our specific recommendations are detailed in the lengthy document entitled "Comprehensive Acquisition Reform", dated January 19, 1994, which I have incorporated as an attachment to this statement. The group has also reviewed this document with your staffs.

Our ten issue areas are as follows:

- Reinventing the Acquisition Culture
- Ensure Public Trust
- Rely on Commercial Products
- Streamline the Acquisition Process
- Broadly Implement Negotiated Rulemaking
- Reform Contract Financing
- Defense Industrial Base Needs
- Defense Export Competitiveness Requirements
- Uniform Environmental Policies; and
- Additional Recommendations

These recommendations cover ten broad themes, with detailed discussion and recommendations for change for each topic grouped under each of those themes. Yet, many of the recommendations that we make in that January 19 report do not require legislation. Taken as a whole, it is a benchmark intended to be used to measure the success of any acquisition "reform" proposal.

While both the administrative and regulatory changes we suggest are a necessary element to the overall reform of the acquisition process, for purposes of this statement, I will focus only on the recommendations that require legislative action.

Obviously some of our recommendations are more critical than others. Some will have a greater impact on the overall acquisition system than others. Yet this recognition should not be viewed as an invitation to enact piecemeal legislation. Time after time, we have witnessed the fact that enactment of piecemeal legislation does not work. Therefore, we urge you and other members and committees of Congress, and the Administration, to take those bold, right steps. The course of our federal acquisition system into the 21st Century will be charted in this session of Congress.

I. ENSURING THE PUBLIC TRUST

At the heart of our federal acquisition system must be a recognition of the absolute need for both government and industry to have confidence that the acquisition system will provide a fair and equitable opportunity for contractors to bid and for the government to be assured of obtaining its goods and services. However, over time, the system has become clogged with laws, rules and procedures which are focused on the potential for the abuse rather than on the ability of the government to obtain the goods and services needed. We believe there are several areas for change in the law that will "ensure the public trust" yet remove unnecessary impediments.

A. Reduce Inquisition Mentality

Today, we face a significantly different decade and procurement environment than existed over the past decade. Now is the right time to reassess the relevance of many of the current statutory and regulatory provisions affecting audit and oversight of contractors.

Many have recognized that micromanagement of the Federal procurement system via numerous laws, regulations and committee oversight has produced a highly inefficient and needlessly complex system. Contract awards take too long and the costs are too high. Often new procurement requirements are applied to contractors on the basis of anecdotal evidence rather than objective measurements. The legitimate desire to prevent incidents of waste, fraud and abuse has led to the over-application of inhibitive laws.

The contracting community recognizes change must occur; many in the Inspector General and audit communities recognize that change must occur; and we believe that the introduction various legislative proposals demonstrates that many in Congress also recognize that change must occur.

Government contracts in general and defense contracts in particular have been subject to ever-increasing controls and audit oversight. A more constructive government-industry partnership, committed to a participatory process by both parties, is greatly needed.

We recommend legislation that would:

- (1) Adopt in statute the policy recommendation of the 800 Panel that "acquisition laws should promote financial and ethical integrity in ways that are: (a) simple and understandable; (b) not unduly burdensome; and (c) encourage sound and efficient procurement practices.";
- (2) Eliminate the duplication of related requirements and the pyramiding of penalties and administrative procedures that occur frequently throughout the current code, which add

confusion and cost, but do not demonstrably promote integrity;

- (3) "Reorient" the role of the Inspectors General to broaden their focus from strict compliance auditing to evaluating management control systems (as proposed in the Vice President's National Performance Review); and
- (4) Implement the NPR recommendation to establish a high-level award for contractor and government acquisition excellence, similar to the Malcolm Baldrige Quality Award.

B. Publish Advance Information on Government Requirements (including Small Business/Small Disadvantaged Business reservations)

Increasing the openness and communication between government requirements personnel and potential sources at the earliest possible time would improve the quality and usefulness of the product/service that is eventually procured, and would provide the maximum amount of competition as a result of enabling requirements personnel to gain visibility into all of the possible technical solutions. The availability of advance information on future government requirements would lead to more complete disclosure, rather than selective distribution, thus increasing the availability of relevant information to every interested party. This would increase the knowledge and opportunities for small and small disadvantaged businesses to compete on future requirements.

We recommend legislation that would require agencies to publish, at least annually, forecasts of out-year business opportunities and requirements. Such forecasts should identify the extent of past competition and the agency's intent to compete the projected requirement or reserve it for any small or small disadvantaged business under existing preference programs.

C. Procurement Integrity

We believe that the great majority of men and women in government procurement (in both industry and government) are honest and sincerely want to do their job right. Many of the problems in this area appear to be the result of confusion over the rules. It is unfortunate that there is a tiny minority in both government and industry who will be dishonest no matter how tightly the rules are written. There are numerous, effective methods and offices available to catch and penalize wrongdoers which have been successful. The revolving-door, "procurement integrity," and related laws need to be simplified and clarified, and redundant laws should be excised from the Code.

We recommend legislation that would eliminate redundant ethics, gratuities, and revolving-door provisions, and that would repeal 31 U.S.C. 1352. We support the Section 800 Panel proposals for

revisions to the Procurement Integrity law. Specifically, the Section 800 Panel recommended the rescission of sections (a) through (h), (j), and (m) of 41 U.S.C. 423. The Panel also recommended that the provisions on protection of procurement information and source selection information at sections (a)(3), (b)(3), and (d) be enacted as a stand-alone information protection provision.

D. Alternative Disputes Resolution (ADR)

In recent years, government contracting has been viewed as a high-risk, low-return business in part because of the great time and expense required to resolve a dispute. Because the government can be sued only when it consents to be, government contractors' remedies have long been limited to cases in the Claims Court and cases brought before the boards of contract appeals. Claims Court proceedings, however, can be costly and time consuming. The boards themselves have also evolved into another court-like system.

Alternative Disputes Resolution (ADR) mechanisms have gained almost universal acceptance worldwide for commercial contracts; in construction, manufacturing, and transportation, many companies no longer accept contracts that do not provide for ADR. Yet government contracts have continued to bear the burden of the more traditional, judicial-type, dispute resolution mechanisms.

ADR, with its inherent flexibility, could give government and private sector managers far greater control over the decision-making process than do traditional litigation methods. There is also the potential for reducing the long-term damage to the buyer/seller relationship. ADR methods can avoid confrontation by settling disputes at the earliest point and at lower levels of management. The Defense Advisory Panel on Government Industry Relations has stated that by "fostering education to develop an awareness of the benefits of ADR and promoting ADR techniques in acquisition regulations, government-contractor relationships will be enhanced."

In 1990, Congress recognized the need to move forward in providing better dispute resolutions in government contract cases with the enactment of the Administrative Disputes Resolution Act (ADRA -- Pub. L. 101-552). The ADRA establishes the framework for government agencies both to train their people in the use of ADR methods and to engage in ADR in most cases, including government contract claims.

The ADRA was meant to capitalize on the experiences of some agencies, such as the U.S. Army Corps of Engineers, which are pioneering the use of ADR procedures in the government. Leaders of some of the boards of contract appeals have called for greater use of ADR.

Industry supports the greater use of ADR methods for settling government contract cases. This will require more action on the part of government agencies to implement the ADRA, and clarification of certain provisions in the ADRA to enhance its application to the unique government contracts arena. But more needs to be done to remove further barriers to the use of ADR. We recommend legislation that would:

- (1) Restate congressional policy in favor of the greater use of ADR proceedings in settling government contract claims, and establish clear deadlines for implementing ADR policies throughout the government;
- (2) Provide funds for training government contract managers in ADR methods, and make such training mandatory;
- (3) Clarify and make consistent the certification requirements in the ADR Act with those in the Contract Disputes Act, and standardize the level for certifications;
- (4) Clarify and strengthen the confidentiality and nondisclosure provisions in the ADR Act to eliminate the disincentive on the part of contractors to enter into ADR proceedings;
- (5) Clarify how ADR "neutrals" or third party decision makers will be paid from agency budgets to eliminate the disincentive on the part of government contracting officers who may be reluctant to use funds from their own budgets to split the cost of ADR proceedings;
- (6) Establish policies encouraging agency "partnering" with contractors before a dispute arises, such as establishing "common goals" contracts; and
- (7) Clarify ADR ethical policies vis-a-vis department Inspectors General who are concerned about government officials working too closely with private contractors.

E. Revise the qui tam provisions of the Federal Civil False Claims Act

The Federal Civil False Claims Act provides for the payment of treble damages and civil penalties for the knowing submission of false claims to the government. Under the Act, individuals ("relators") may bring a civil action on behalf of the government, called a qui tam suit. If the suit results in a recovery for the government, the relator is entitled to a percentage of the recovery as a reward. The amount of the reward is dependent on several factors, including the relator's culpability, if any. Since its original passage in 1863, several amendments to the Act have been made to address the government's right to participate in the case (to intervene), to address the relator's share of the recovery and

to address abuses of the law when a relator files a case based on information in the public domain. The clear intent of this law is to incentivize those with information related to misuse of government funds to bring such information to the government's attention through legal proceedings, thereby protecting the government's interests. Further reforms are necessary to more adequately balance the private and public good.

We recommend legislation that, at a minimum, would:

- 1) prohibit government employees from being a relator in a qui tam suit for information they learned during the course of their government service;
- 2) recognize that the submission of a voluntary disclosure to the government under any recognized program would bar a qui tam action based on the same information;
- 3) amend the Contract Disputes Act to permit cases to go forward even though there is an allegation of fraud; and
- 4) allow a court discretion to reduce or eliminate a relator's bounty if the relator was a participant in the fraud.

F. Ethical Conduct and the Solicitation Process

The solicitation process should be conducted with professionalism and the highest business standards. This is not in conflict with the goals of openness and greater transparency in the process. Ethical procurements can be conducted without the 200-plus representations and certifications now required by statute or regulation in the typical DoD solicitation and contract. We endorse the conclusion of the Section 800 Panel that, in many cases, worthy objectives have become mired in administrative paperwork. Many certifications can be eliminated simply because compliance is already required by law and is unrelated to the government-procurement process (e.g., Clean Air and Water Acts).

We recommend legislation that would eliminate all statutory and regulatory certifications and representations except for the following, which are the minimum essential to maintain an ethical buyer-seller relationship:

Procurement Integrity, 41 USC 423 (revised)
Contingency Fee, 10 USC 2306(b) and 41 USC 254(a)
Officials Not to Benefit, 41 USC 22
Anti-Kickback, 41 USC 51-58.

Even these certifications may not be appropriate in certain procurements, such as small purchase, sealed bid, or commercial item procurements.

II. COMMERCIAL PRODUCTS

There is a wide-spread recognition of the need for enactment and implementation of a comprehensive, government-wide, statute that facilitates the government's acquisition of commercial items.

Meaningful and comprehensive acquisition reform requires adoption of a broad, flexible commercial items statute that enables the federal government to fully exploit the benefits of commercial technologies, services, and products.

The Report of the Section 800 Panel describes the impediments encountered by industry in offering commercial products to the Department of Defense. Nevertheless, the Panel's comments that certain clauses posed no problems indicates that the Panel did not fully recognize the difficulties caused by those clauses to commercial contractors.

We believe that one of the economic principles underlying any proposed commercial items statute is that the forces of the commercial marketplace may be relied upon as much by the U.S. government as they are by all other buyers to assure that the prices and terms are fair and reasonable, and that product quality meets contract requirements. When the government acts as just another player in a larger commercial marketplace, it enjoys the same protection as other buyers and needs no unique protection.

We recommend the enactment of legislation, as detailed in our January 19 attachment. Parallel changes to Title III of the Federal Property and Administrative Services Act should also be enacted to provide a uniform government-wide statutory basis for commercial acquisition. Among our priorities are broadening the definition of the term "commercial products", limiting the flow down of the requirements to suppliers and commercial divisions, expanding the list of statutes inapplicable to commercial products and eliminating any post-award audit.

III. SIMPLIFY THE ACQUISITION PROCESS

For the most part, the procurement process is regulatory and administrative in nature and does not easily lend itself to legislative remedies. However, Congress can and should take a forward-looking, active, leadership role.

We recommend the following important elements in simplifying the acquisition process by reducing or eliminating duplicative and unnecessary statutes and policies.

A. Permanently Raise Threshold of the Truth in Negotiations Act to \$500,000

Raising the threshold to \$500,000 will permit a more orderly and efficient procurement process for contracts that are relatively small in dollars. Additionally, even a \$500,000 threshold represents a minimum government exposure.

B. Increase the Simplified Acquisition Threshold

We recommend creating a simplified acquisition threshold at \$100,000 for all procurements, and expanding the list of statutes below \$100,000 that would not apply to purchases below that level. Our detailed list of statutes is included in our January 19 report, at page 52.

In addition, we support legislation that would require agencies only to continue to adhere to the requirement for publishing notice in the Commerce Business Daily for purchases above \$25,000 where the activity provides non-electronic notice to industry; raising the CBD publication threshold to \$50,000 for contracting activities that have implemented the basic FACNET system architectural capabilities as proposed in the Bibray bill and in the Conyers/Clinger amendments to H.R. 2238; and finally, to raise the CBD publication threshold to \$100,000 for contract-ing activities that have implemented the expanded FACNET system architectural capabilities.

In addition, we support the legislative proposal that would require the Comptroller General to monitor and report on the effect of the increased thresholds on small businesses and authorizes the OFPP Administrator to direct the implementation of electronic commerce government-wide.

C. Use of Value-Based Contracting

There is consensus among procurement experts in both the public and private sectors that a contemporary, systematic (i.e., quality-based) approach to contracting is long overdue. Properly designed and executed, contracting for value will materially improve the quality, responsiveness, and cost efficiency of the goods and services acquired by the Federal government, and will enable the balancing and trading-off of technical, price, and other relevant considerations in the source selection process.

We recommend legislation that would require the Administrator of the Office of Federal Procurement Policy to establish minimum guidelines and requirements for such a value-based contracting system. The guidelines should have at least the following elements:

- 1) the use of draft requests for proposals;
- 2) standards for defining top-level evaluation factors,

- including a clear preference for assigning relevant weights;
- 3) a strong preference for incentive contracting in appropriate situations;
- 4) strict prohibitions against technical leveling at any stage in the source selection process;
- 5) inclusion of cost-realism evaluation procedures;
- 6) clear procedures and guidance for determining technical-to-cost ratios and maintaining their integrity throughout the source selection process;
- 7) comprehensive guidelines on how to perform complex technical/cost trade-off analyses during source selection; and
- 8) fully-defined procedures for conducting meaningful debriefings.

D. Simplify the Solicitation Process

The solicitation process currently employed for the acquisition of both goods and services is unnecessarily lengthy and complex. By simplifying the process, the government will be able to procure goods and services in a more timely manner, and in a way which enables the government to realize the cost and efficiency benefits associated with such procurements. This was made very clear by both the Section 800 Panel and the National Performance Review.

We recommend changes that would require the Director of the Office of Management and Budget, in concert with the Administrator of the Office of Federal Procurement Policy, to issue regulations and policy guidelines that will simplify the acquisition process, and reduce or eliminate duplicative and unnecessary acquisition regulations and policies. At a minimum, the regulations and policy guidance issued by OMB, OFPP, or other relevant Federal agencies shall:

- (A) Promote the use of draft requests for proposals. Draft RFPs should be routinely used in cases where performance requirements for goods or services involve substantial complexity and/or call for sophisticated problem solving, significant technological innovation, and/or creativity;
- (B) Specify that where public/private cost-comparison studies are required, such as through the OMB Circular A-76 or other processes, such cost-comparison studies must be completed in 12 months for a single function and 24 months for a multiple function; and
- (C) Require that once such cost-comparison studies are commenced, they shall be completed in an uninterrupted manner.

E. Use Contractor Past Performance as Source Selection Factor

Past performance is one of the most critical factors in successful source selection; yet, there remains in the Federal government a lack of uniformity, consistency, and application of past performance as criteria for award. Even in those agencies where past performance is applied, the systems used are only loosely linked to the source selection process and lack the features needed to assure an effective and equitable system.

We recommend legislative changes that would direct the OFPP Administrator to establish a government-wide requirement for the use of past performance in appropriate source selection determinations. The design of such a system should include at least the following features:

- 1) a clear definition of the types of contracts subject to application of the past performance criteria;
- 2) a uniform approach for government-wide application;
- 3) contractor access to their own past performance review files and strong protection against improper or unauthorized disclosure of a contractor's performance rating;
- 4) due process features which permit contractors to respond to negative evaluations and the authority for a contractor to receive an independent evaluation of its concerns with the resulting information maintained by a disinterested official within the agency;
- 5) criteria to trigger, after a fixed period of time, the purging of any record of past performance information no longer relevant to the determination of the ability of a contractor to perform on future contracts;
- 6) a mechanism by which extenuating circumstances that may have contributed to a poor previous past performance evaluation can be made known to the contracting officer, either through comments provided by the contractor and contracting officer involved or other reliable and accurate means; and
- 7) the avoidance of any system or procedure which sets in place a "brightline" test or other, firm baseline scoring system which effectively removes from the contracting officer a reasonable degree of subjectivity and/or analysis that enables a judgement based on all factors and circumstances.

F. Use Consistent Protest and Debriefing Process

Industry supports a more clear and consistent process for the treatment of protests and debriefings. We support the recommendations contained in sections 142 and 143 of H.R. 3586.

G. Eliminate Abuse of Non-Standard Clauses

The use of non-standard clauses, despite attempts and/or promises to limit their use, continues largely unabated and adds unnecessary cost, time, and complexity to the procurement process. We recommend that significant administrative actions be taken to meaningfully reduce the use of non-standard clauses. In addition, we recommend legislation that would establish a "public protection" provision for contract clauses similar to the public protection clause that exists under the Paperwork Reduction Act for agencies that fail to obtain OMB approval of a paperwork clearance request.

H. Judicious Use of Government-Unique Specifications and Standards

All too frequently, contractors seeking government work must subject their bids and work-products to a range of government-unique standards and specifications which are unrelated to the needs of the government and which add costs to the contractor and government, and/or result in the contractor being unable to deliver to the government goods and services as required by the detailed specifications and standards. Industry recommends that the government adopt a "tell us what to do, not how to do it" standard for acquisition. In our view, specifications for goods or services shall not include:

- (a) specific designs, manufacturing processes, or procedures; or
- (b) military standards or military specifications which would restrict a potential contractor's ability to satisfy the government's requirements if that contractor(s) is able to demonstrate that the government's needs can be otherwise met.

I. Support Six-year Statute of Limitations for Claims and Repeal 10 USC 2405

We support a six-year statute of limitations, but do not support the use of the term "event or events" giving rise to the claim for determining the starting point for tolling. 10 USC 2405 (applicable to shipbuilding claims only) creates extensive litigation because of the regulatory interpretation of the term "event or events" in determining when the 18-month time bar begins to run. The six-year statute of limitations should apply equally to the government and industry and the statute should explicitly direct that the tolling

period does not begin to run until the contractor both (i) knew or should have known that a basis for the claim existed, and (ii) could identify, quantify, and document its claim in accordance with the certification requirements contained in the Contract Disputes Act. We also recommend repealing the unique contract claim provision applicable only to shipbuilding in 10 USC 2405.

J. Rights in Technical Data

Intellectual property encompasses patents, copyrights, trademarks, licensing, technology transfer, and several related areas - as they relate to both hardware and computer software. The Section 800 Panel reviewed the subject of intellectual property in some depth, and made several recommendations which (except for a proposed alternative method of establishing rights in technical data) industry generally supports. Of all the facets of intellectual property, rights in technical data is the most pervasive and has been the centerpiece of most discussions. The right and ability of developers of products and processes to retain control of the technical data resulting from those developments is critical to their continued viability. Ensuring that those rights are protected is also a key factor in encouraging firms to continue to invest in research and to develop new and more advanced products and processes.

Congress included very detailed requirements with respect to rights in technical data in "The Defense Procurement Act of 1984". Many of the provisions of this statute were enacted in reaction to what was alleged as overpricing of spare parts in the early 1980s, coupled with a perception that many prime contractors and original equipment manufacturers were claiming proprietary rights in data that may have been developed in whole or in part at government expense. One of the purposes of the statute was to help the government acquire data packages for competitive reprourement of spare parts to the maximum extent practicable. Several clarifying amendments were enacted over the next few years to facilitate implementation of the statute. Congress directed that implementing regulations recognize and balance the interests of both the government and the developer in technical data, depending on the source of funds used to develop the data.

Developing an acceptable and "balanced" regulation proved to be a difficult and elusive goal. An October 1988 interim regulation is still the operative coverage, despite several attempts in following years to reach agreement on a final regulation. Congress added a provision (Section 807) to the Fiscal Year 1992 DoD Authorization Act which required DoD to establish a government/industry committee to develop and promulgate regulations satisfactory to both parties. The effects of the 807 Committee were initiated after and overlapped the work of the Section 800 Panel. Therefore, the 800 Panel recommended only clarifying amendments to the data rights statutes codified at 10 USC

2320/2321, including an amendment to provide a separate policy for commercial items or components. As noted above, the 800 Panel also suggested an alternative approach based on determination of needs before determining rights. However, this suggested approach was not endorsed by industry, nor was it included in either S. 1587 or the two House proposals.

The 807 Committee has now completed its deliberations, and a final draft of its report and proposed regulations are being readied for submission to the Secretary of Defense and the Armed Services Committees. They will then be published for public comment, and the ultimate objective is to issue them as final regulations replacing the October 1988 interim regulations. It is generally believed that the current draft represents significant improvement over the interim regulations and that it resolves some of the basic issues (e.g., better definition of what is encompassed by "privately developed"). However, it is too early to assume that it will satisfactorily resolve all the troublesome issues that have surrounded this effort from the beginning. It is voluminous and, like its predecessors, appears to be based on a premise that the government needs or will need data with respect to virtually everything it acquires. Its volume is probably testimony to the 807 Committee's attempt to resolve all the issues which concerned both DoD and industry. Only time will tell how successful they have been.

Given the above scenario, it is difficult to make specific recommendations for legislative action. However, industry has long been concerned that one of the primary objectives of data regulations proposed by DoD is to acquire technical data for the purpose of competitive repurchase, with rights being a secondary objective. This approach has led to (1) an unnecessarily voluminous regulation; (2) the acquisition of literally warehouses full of data which may be largely unused and unusable because of incomplete data packages or restrictive markings which cannot be resolved; and (3) a waste of resources validating rights in data for which there may never be a need. The government's interests would seem to be even better protected by a regulation which require the developer/contractor and its subcontractors to maintain up-to-date data packages for deliverables under a contract, but which postpone the determination/negotiation/ validation of rights until such time as the government establishes a need for the data for competitive repurchase.

Congress should enact the clarifying amendments to 10 USC 2320 and 2321 recommended by the Section 800 Panel, including the proposed amendment to 10 USC 2320 (a) (3) to provide a separate policy for commercial items or components. However, the proposed amendment to 10 USC 2320 (a) (3) should be modified to read: "Notwithstanding paragraph 2 above, the Secretary of Defense shall prescribe regulations for contracts for commercial items or components. Such regulations shall provide that when the government acquires

commercial items or components, it will only receive such technical data and rights thereto as are provided to any commercial customer. Any additional data or rights are subject to negotiation on a case-by-case basis."

Additional statutory changes may be warranted after final resolution of any problems which may arise during the public comment period on the 807 Committee report, or when putting this regulation into practice. At that time, in the interest of streamlining and simplifying the acquisition process, it may be possible to repeal the very detailed proscriptions now codified in 10 USC 2320 and 2321. These could be replaced by a more concise statement of congressional policy which would make it clear, among other things, that data rights are a property right which a contractor should not be coerced into giving up as a condition of contracting. The statute should also include the concept of balancing the interests of both government and industry, and should clearly recognize industry's ownership of data rights in products or processes developed at private expense. A shortened statutory coverage such as this would continue to provide the underpinning for the regulations developed by the 807 Committee, but would give the Secretary of Defense needed flexibility to modify those regulations to meet changing needs as defense downsizing continues.

IV. IMPLEMENT NEGOTIATED RULEMAKING

The current Federal philosophy and approach to determining the rules which control and guide the buyer-seller relationship is generally flawed: (1) it is predominantly a one-way, unilateral process on the part of the government, largely devoid of two-way constructive problem solving; (2) it frequently lacks policy sophistication and substantive depth; and (3) it applies broad-scale "reforms" to solve narrow problems.

We recommend legislation that would direct the use of negotiated rulemaking in the development of procurement rules, other than for technical or administrative changes. In addition, the authority of the Administrator of the Office of Federal Procurement Policy should be clarified to confer responsibility for the content of the FAR and agency regulations supplementing the FAR.

V. REFORM CONTRACT FINANCING

The government is a unique customer, with many unique requirements. Financing of government contracts differs in several important respects from financing a commercial endeavor. Notably:

- Interest is not an allowable expense, i.e., the cost of debt financing cannot be directly charged to and recovered in the prices of unique government items.

- The government is the only customer for most of the complex systems (particularly military hardware) which it buys.

Current statutory authority in the area of contract finance permits "advance, partial, progress or other payments". Progress payments are the customary method of financing fixed-price type contracts. Other forms of financing are rarely used.

Other unique facets of payment under government contracts which affect a contractor's financial health include: 1) caps on fees and profits which may be earned; 2) specific disallowance of or limitation on the recovery of numerous costs which are considered customary costs of conducting a commercial enterprise; 3) delays in closing out contracts and releasing funds withheld by the government; and, 4) tax policies which discriminate against government contractors performing long-term contracts. We have provided legislative recommendations for each of these.

A. Simplify Financing of Government Contracts

The current system of contract financing is unnecessarily circumscribed by both statutory and regulatory requirements and limitations. The result is an overly complex system which does not provide adequate financing, and which deters many firms from becoming government contractors. The acquisition process must be simplified and streamlined to ensure that agencies get the most for the procurement dollars available, while at the same time preserving a viable, financially healthy industrial base.

Financing of government contract performance must be substantially simplified as part of acquisition reform. A prerequisite for implementation of this aspect of acquisition reform is an amendment to 10 U.S.C. 2307 which would stipulate that progress payments may include time based/event monitored financing payments, thereby permitting greater use of commercial type financing. 10 U.S.C.2307, and its counterpart in the Federal Property Act, should be further amended to clearly authorize agencies to use commercial payment practices when buying commercial items.

B. Alternative Progress Payment Method

The current system of progress payments based on costs, with its complex controls, costly administration (both for the government and for contractors), potential for litigation (stemming from required certifications and challenges), and unallowability of interest on borrowed capital as a cost of doing business, increases the cost of DoB hardware and limits the base of suppliers. An alternative to the current progress payment system is imperative if reform of contract financing is to become a reality.

We recommend legislation which will encourage, rather than inhibit, an agency's flexibility in making progress payments. Agencies should be able, and indeed encouraged, to make progress payments at or near 100 percent, the same as costs are reimbursed under cost-type contracts, while eliminating the complex controls now in place. Agencies can adequately protect their interests by appropriate withholdings as a contract nears completion. These changes will enable an agency to get more for its budget by reducing both the cost of contracting and the administrative costs of the current complex payment system.

C. Reduce Contract Close-out Lag Time

Funds withheld during contract performance are not released to the contractor until the final audit is conducted. In practice, these funds are often held by the government for three to five years, and in a significant number of cases, funds have been withheld for longer periods - in one case up to fourteen years. Auditing of completed contracts does not appear to be a high priority for DCAA. Since the government does not pay interest on withholdings, there is no incentive to expeditiously conduct final audits, or even to make partial releases of funds. If anything, there would appear to be an incentive to retain the withholdings as long as possible, since they provide a free "float" to the government. The government might have an incentive to release withholdings to the maximum extent feasible pending final audit, and to conduct final audits expeditiously, if it were required to pay interest on the withholdings after a reasonable time.

Industry recommends the enactment of legislation requiring the government to pay interest, retroactively, on all withholdings still retained by the government one year after performance is complete, if final audit and close-out is delayed beyond one year and the contractor is not responsible for the delay.

D. Profit and Fee Limitations

The basic procurement statutes include a 15 percent fee limit on cost-plus fixed fee research and development contracts and a six percent fee limit on contracts for architect/engineering services. In order to incentivize contractors to invest in the necessary facilities and resources for research and ensure an adequate return on that investment, these percentage caps must be eliminated.

E. Allowable Costs

The cost principles in the Federal Acquisition Regulation provide guidance as to costs that are not allowable under government contracts. Many costs which are considered ordinary and necessary costs of doing business in the commercial world are

made specifically unallowable as a matter of public policy. We recommend that the cost principles which are codified in 10 U.S.C. 2324, and any other statutory proscriptions with respect to allowability of specific costs, be repealed.

VI. DEFENSE INDUSTRIAL BASE

A. Decrease Government Infrastructure/Increase Reliance on Private Sector

The depot maintenance facilities and Federally Funded Research and Development Centers (FFRDCs) have continued to grow since the mid- to late-1980s while the defense budget was actually decreasing. Over 600 government maintenance depots and laboratories, in addition to FFRDCs, currently exist and are resisting or trying to minimize any downsizing that may impact them. The high technology research and development that these institutions conduct is critical to the country's national security and to maintaining a worldwide technological advantage. However, it is equally important to ensure the preservation of an adequate and financially healthy private sector industrial base. Therefore, government depots, laboratories and FFRDCs should be downsized commensurate with the overall downsizing of defense.

Competition between public and private sector facilities for depot-level maintenance work has been promoted as a way to resolve the issue of public sector versus private sector capabilities. Those who favor this competition argue that only those public facilities which can win competitions will survive, thus ensuring the most cost-effective result for the government. However, this approach presents several problems, not the least of which is that it may result in the loss of core capabilities which are critical to military readiness. The facilities which win competitions will be those which offer the lowest prices, but not necessarily those which possess the most critical capabilities. Furthermore, there is clearly no level playing field for public sector/private sector competitions, without which a valid competition on the basis of costs is not possible.

B. Eliminate Barriers to Commercial-Military Integration

The government's procurement practices have constrained U.S. defense-related companies and not allowed them to be world class manufacturers and competitors. Government restrictions, bureaucracy, excessive and duplicative paperwork and auditing have all contributed to the current process.

The government should transform the current system to mirror that of a commercial customer when buying commercial products and services. Specific recommendations for expanding the use of commercial products and services are discussed in Section II

above. Further, we recommend legislation that would:

- (1) Strengthen the utility of DoD's DFARS Part 211, the shortened form commercial contract, so that it can be used more extensively when acquiring commercial products and services, and continue to improve these terms and practices to more closely resemble the Uniform Commercial Code (UCC); and
- (2) Streamline the GSA Multiple Award Schedule.

VII. DEFENSE EXPORT COMPETITIVENESS

A. Repeal Recoupment

The fee for recoupment of non-recurring costs was originally adopted in the early 1960s as a way of equitably sharing weapon development costs with U.S. allies. The Arms Export Control Act of 1976 specified that recoupment be applied to Foreign Military Sales (FMS) of Major Defense Equipment. Over the years, the Department of Defense, through regulations, expanded the recoupment requirements to require that an additional charge be paid to the U.S. government on sales of products and technologies developed under government contracts, including the commercial application of those technologies.

The Clinton Administration has completed action to repeal the administrative provisions relating to recoupment, and has submitted legislation to repeal the statutory requirement for recoupment under the Arms Export Control Act. The Section 800 Panel also recommended this statutory change. Elimination of recoupment will allow American firms to compete more effectively for billions of dollars in additional business and will preserve tens of thousands of U.S. jobs. We support enactment of the President's recommendation to repeal the statutory provision on recoupment.

B. Statutory Domestic Source Restrictions Should Be Reduced

The Section 800 Panel proposed the incorporation of the Buy American Act and others into a comprehensive statute and discussed, in detail, specific recommendations for change to the Buy American Act and other laws. The Panel recommended that statutory domestic source restrictions applicable to DoD be reduced and restated in a more comprehensive way. We share the Panel's goals and broad policy direction.

While the Section 800 Panel could have gone further in its recommendations for repeal of outdated and unnecessary domestic source restrictions, we are satisfied that the Panel's proposal provides a clear framework for the Congress before enacting any unique domestic source restrictions in the future.

We support an amendment to the Buy American Act to modify the rule of origin from the current "50 percent component test" to the "substantial transformation test" already found in the Trade Agreements Act, except as it would relate to any industry that is not protected by anti-dumping and countervailing duties. We also propose conforming amendments to the Buy American Act as contained in section 7.1.1.4 of the Section 800 Panel Report.

In addition, we strongly support the consolidation into a single subchapter of the source restrictions which currently appear in uncodified provisions of law. We also support the codification of all source restrictions into a single chapter. We believe that the light which this codification will shine on unique domestic source restrictions, usually advanced by special interests, will be a sufficient deterrent to the enactment of any additional unnecessary and burdensome source restrictions.

While we recognize the Section 800 Panel's determination to subject DoD's acquisition of certain commercial items to the defense trade provisions, industry supports the proposal to exempt simplified acquisition, commercial items, and commercial components from domestic product preferences and source restrictions.

C. Progress Payment Rates for Foreign Military Sales (FMS)

Progress payment rates have varied over the years, with the rate for new contracts awarded after November 11, 1993, set by Congress at 75 percent. Although not required by law, DOD has taken the position that it will finance contractors at the same rate for FMS sales. If DoD would increase the progress payment rate to 95 percent for cash FMS sales and to 95 percent up to the foreign country's cash reserves held by the U.S. government, it would help industry's overall financial condition and compensate for the additional costs related to foreign sales, while still withholding a final payment until completion of the contract. Such an increase would have no impact on the budget, as the funds involved are of foreign government origin.

We recommend legislation that would permanently increase progress payment rates to 95 percent for FMS cash sales and to 95 percent up to the foreign country's cash reserves held by the U.S. government.

D. Proposed phase-out of DoD's Special Defense Acquisition Fund (SDAF) ceiling

The SDAF, a revolving capital fund, allows DoD to purchase U.S. defense equipment in advance of anticipated foreign sales. It is intended to smooth out production runs and increase the volume of combined service and SDAF purchases. Increased volume and stable production lines in turn reduce unit prices to both DoD and

foreign customers and allow prime contractors to maintain stability for their work force and subcontractor base.

The SDAF was fully capitalized in 1987, and currently uses receipts from purchases by SDAF customers to finance new contracts. Thus, no new funds are needed for SDAF. Congress sets an annual obligation ceiling which determines how much of the fund DoD may commit in new contracts. We recommend legislation that would eliminate the congressional obligation ceiling on the SDAF.

VII. UNIFORM ENVIRONMENTAL POLICIES

It is essential to determine the appropriate allocation of accountability and responsibility for environmental compliance, clean-up and environmentally-related liability that are directly attributable to past, current and prospective performance of government contracts for essential goods and services.

Federal agencies are increasingly distancing themselves from the potential of environmental liability through the use of a variety of liability-shifting techniques. In "Environmental Consequence Analyses of Major Defense Acquisition Programs," the DoD IG concluded that the individual services are not in full compliance with national environmental laws and policies throughout the acquisition process. The Report states that DoD "cannot estimate the government's overall liability for environmental remediation, clean-up and pollution prevention measures, (cannot) actively monitor and control environmental costs; and (cannot) identify actual and contingent liabilities for environmental costs." Among its recommendations was a requirement for the individual services to identify costs for environmental clean-up and remediation liabilities at contractor facilities, including the portion for which the government is potentially responsible.

There are a number of critical factors that must be taken into account in establishing a proper determination of liability, spelled out more fully in our January 19 document. We recommend legislation that would establish an Environmental Liability Commission which will specifically address the allocation of responsibility and liability for costs associated with environmental compliance, remediation and clean-up of hazardous waste.

IX. ADDITIONAL RECOMMENDATIONS

A. Further Encourage Small Business and Small Disadvantaged Business Participation in Federal Contracting

As presently structured, the Small Business Act and Department of Defense-related statutes represent numerous ad hoc and potentially conflicting programs designed to assist small

business and various subcategories of small business. Their efforts, however laudable, have caused confusion, complexity, and difficulty for small business and the officials administering the various programs. Acquisition reform should seek to restructure the current patchwork of legislative and administrative efforts, promote clear goals and objectives, and streamline acquisition procedures.

We recommend several additional legislative changes to enhance the opportunities for small business participation in federal procurement, including the following:

- (1) retain the current rule of two for the small business reservation under the new simplified acquisition threshold;
- (2) expand the current mentor-protégé pilot program (section 831 of Public Law 101-510, et al) to the civilian agencies;
- (3) implement on a government-wide basis for government agencies and prime contractors the program authorities for small and disadvantaged firms provided to DoD in section 10 U.S. C. 2323; and
- (4) authorize a contracting agency to allow an 8(a) small business to contract directly to the small business unless the contracting officer or the small business specifically requests the Small Business Administration to be a signatory to the contract.
- (5) Provide government-wide authority on a permanent basis for comprehensive company subcontracting plans.
- (6) Provide for a three year government-wide planning document on the small business reservation program.

B. Stabilize and Harmonize the Claims and Resolution Process

The primary statute governing contract claims and disputes is the Contract Disputes Act (CDA). The Section 800 Advisory Panel gave considerable attention to it and other statutes that govern the claims and disputes resolution process. After completing its top to bottom review of claims and disputes, the Panel concluded that while major changes are not necessary, the claims and disputes process does need fine tuning. The Panel made three principal recommendations for amendments to the Contract Disputes Act. First, clarify that the process for obtaining or bypassing the contracting officer's decision is available even in cases when fraud is suspected. Second, give contract boards of appeal the authority to transfer a pending appeal, upon the motion of either party, to the Claims Court when fraud is at issue. Third, amend

the exclusive jurisdiction of the Boards to permit trial of a Board matter as a counterclaim made by a contractor in a district court fraud action brought by the government.

We support the basic thrust of the recommended changes to the claims certification provisions proposed for 10 USC 2410, including increasing the statutory thresholds. However, we caution against further modifying or limiting the authority of a company to determine who is authorized to bind the contractor with respect to a specific claim. After three years of needless litigation, we trust that the legislative changes included in the Fiscal Year 1993 DoD Authorization Act and the Federal Courts Administration Act of 1992 (PL 102-572) will bring much needed stability to this important area of law and contract administration.

We support the establishment of the six-year statute of limitations, provided that it applies equally to the government and industry, and that the statute explicitly directs that the time period does not begin to run until the contractor (i) knew or should have known that a basis for the claim existed; and (ii) could document its claim in accordance with the certification requirements contained in the CDA. In our view, the Contract Disputes Act forums should have primary jurisdiction over the substance of government contract claims, at the request of either party.

Finally, while we support having general consistency in the time limits to file appeals with either the Claims Courts or the Boards, we cautioned the Panel that there are practical and substantive reasons for having a longer period of time for the Claims Court.

While supportive of each of the three Panel recommendations in this area, we would have preferred that they had gone further. We hope that Congress will do so.

C. Treatment of Expired and Merged Surplus Accounts (M Accounts)

Sections 1405 and 1406 of Public Law 101-510, the Fiscal 1991 National Defense Authorization Act, amended sections 1551-1558 of Title 31 United States Code to abolish accumulated funds in the merged surplus accounts ("M" accounts) and phase out expired appropriations (funds no longer available for obligation for new procurements) by September 30, 1993. The "M" account is one of two merged accounts, which are repositories for expired funds. Unobligated funds that have expired flow into the merged surplus account. Obligated funds earmarked for spending go into the "M" account when they expire. Historically, the funds were used to pay for continuing obligations such as cost overruns on cost type and fixed price incentive contracts and changes within the scope of the contract, such as economic price adjustments.

The problem with the action taken in Public Law 101-510 is that appropriations not disbursed within five years are canceled. This creates a funding problem on contracts that take more than five years to complete, completed contracts that have not been closed after five years (waiting for overhead settlements, subcontractor releases, etc.), and settlement of claims that take longer than five years. New appropriations, reappropriation, or reprogrammed funds would be required to cover such costs. Such actions would only exacerbate the growing budget squeeze.

We recommend legislation that would amend section 1552(a) of Title 31 to exempt sufficient obligated funds from the five-year expiration rules to allow completion of unfinished work, and pay close-out costs and contract claims.

Thank you for the opportunity to testify before the Subcommittee.

STATEMENT OF

ANTHONY ROBINSON
PRESIDENT
MINORITY BUSINESS ENTERPRISE LEGAL DEFENSE
AND EDUCATION FUND, INC. (MBELDEF)

Before the

SUBCOMMITTEE ON PROCUREMENT, TAXATION AND TOURISM
COMMITTEE ON SMALL BUSINESS
U.S. HOUSE OF REPRESENTATIVES

FEBRUARY 2, 1994

Good morning, Mr. Chairman and members of this Committee, I am pleased that you have afforded a voice from the minority business community the opportunity to appear before you today and discuss our deep concerns regarding legislation under the guise of "procurement reform" that is currently before Congress.

The Minority Business Enterprise Legal Defense and Education Fund, Inc. ("MBELDEF") is a national non-profit public interest law firm and membership advocacy organization founded in 1980 by former U.S. Congressman Mitchell (7th Dist. - MD) for the purpose of providing legal defense of the class interests of minority business enterprises ("MBEs").

MBELDEF considers integration of the marketplace to be the second phase of the civil rights struggle. Economic development of the minority community is essential to equality of opportunity and justice in America. We have found that the creation and development of legally defensible MBE programs for the benefit of racial minorities and women are effective in eradicating racial and gender discrimination from the public

and private sectors of the marketplace.

While it is inevitable that some form of "procurement reform" will be passed in Congress this year, I caution you to consider the effects on the small and minority business community.

A perfect example of what I refer to is S. 1587 being sponsored by Senators Glenn, Nunn, Bingaman, Levin, Bumpers, and Lieberman, whose purpose is and I quote "to revise and streamline the acquisition laws of the federal government and for other purposes". Just what those "other purposes are has become crystal clear". S. 1587 will dismantle the laws of this country to the point where small and minority businesses are no longer in existence, and the economic fiber of this country will be in the hands of a privileged few.

What is especially disturbing about this proposed legislation is the fact that the Clinton Administration is pulling out all stops to see its enactment. This not only by an Administration that daily bestows accolades on the small business community for keeping this country

going, but whose sponsors come from the one party whom the small and minority business community saw as an ally - before the Presidential election.

I can assure you that if S. 1587 is passed members of the Democratic Party will be hard pressed to explain not only to the minority community but the small business community as a whole - how in the name of streamlining the federal acquisition process, they waived over 20 years of laws that facilitate the growth and development of small and minority businesses in this country.

20 years of legislation that have not been fully enforced either by the past Administrations or by Congress.

20 years of legislation that allows for the entrance of small and minority businesses into the marketplace - established by Congress because in their wisdom they did not want to limit the capacity of this Country to compete. Nor did they wish to place the well being of this entire Country in the hands of a privileged few. History is full examples as to

why this does not work.

To deprive any group of individuals the opportunity to establish an economic base, especially those groups who will be in the majority within the next decade, is the same as dooming this country to failure in the business arena of the future.

I point out the alarming fact that the small and minority business community would never have had the opportunity to see, much less challenge this proposed legislation as it was all created and carried behind closed doors, were it not for the efforts of a few true small business advocates in Congress who brought it to our attention.

Since its discovery in October of 1993, the small and minority business community have met with several representatives of the Administration that included DoD, GSA, OFPP (both Administrators Burman and Kelman), SBA (who by the way was not even aware of S. 1587's contents), and the President's National Economic Council in an attempt to voice our concerns, only to be told point blank - everything will stay

as written.

It is to contain amendments that reduce the number of days in which a contractor may request a debriefing, reduce the number of days in which a contractor may file a bid protest, give the Office of Federal Procurement Policy test authority to waive laws (who by the way has yet to enforce various pieces of legislation that it has laid out), also permit state and local governments to substitute their own descriptions for subcontracting plans.

MBELDEF especially has a vested interest in S. 1587 because It would practically void the Small Business Act which was authored and fought for by our Chairman, former Congressman Parren Mitchell.

What we consider to be the most heinous proposals in S. 1587 is the waiver of the requirement of subcontracting plans (mandated by the Small Business Act) for vendors of commercial products. Commercial products are defined as anything that is sold currently or will, at some time in the future, be sold in the marketplace...like a jet aircraft. The

waiver has been broadened so that it includes Public Utilities. Not only is the definition so far reaching, it applies whether or not any public sales have actually been made.

The small and minority business community believe that this is an attempt by the Clinton Administration, and proponents of this legislation, who consist of a majority of the large prime contractors in the federal government, (under the guise of efficiency) to cast aside the social and economic programs with which they disagree.

The reasoning being given for these drastic waivers of law...."the statutes and implementing regulations create an obligation that is inconsistent with normal commercial practices. In other words a commercial vendor should not be required to alter the firm's accounting, purchasing, and contract administration practices in order to be able to market to the government. They seem to suggest that a business in the commercial market can contract with whom it chooses and should not receive any direction from the Congress. Indeed, a business in the commercial market can also refuse to contract with another firm, just because it is

a small business, or most especially because it is principally owned by a minority.

Once again, I remind you that under S. 1587 a commercial item is anything currently sold or one which will, at some time in the future, be sold in the marketplace, whether or not any public sales actually are made. This would include anything from a pen to a jet aircraft. Again, this broad definition will also include public utilities.

The large prime contractor community has long advocated the elimination of the current requirement for the application and administration of subcontracting goaling requirements with small and minority businesses on a contract by contract basis. While we in the small and minority community has strongly maintained the need to have contract-by-contract accountability so that a prime contractor's performance with respect to its subcontract goals can be scrutinized in the same manner as other elements of contract performance. We have also advocated greater use of a prime contractor's past performance with respect to subcontract goals as an valuation factor in the award of future contract

business. In addition we have urged an application of liquidated damages for the failure of a prime contractor to faithfully discharge its subcontracting obligations.

The proposal to eliminate subcontracting plans poses a critical problem for the small and minority business community when one takes into consideration the reduction in the overall procurements of the Department of Defense and other government agencies which has fueled the drive to consolidate purchases into ever larger and more diverse solicitations. It is not uncommon for large groups of services or numerous items, not all of which are common or related, to be grouped or "bundled" together into a single solicitation which results in the award of a contract, often with multi-year options to the winner. Small and minority business can rarely win such large and diverse solicitations. So through contract bundling, small business concerns are effectively eliminated from the government market.

The procuring agencies will argue that contract bundling must take place as a result of their need to reduce the number of contracts awarded and

administered, so they were directing small and minority business to the subcontracting market, noting that prime contractors were required to meet goals for small and minority business participation.

Now, the Clinton Administration and some of our more distinguished Legislators are suggesting that the small and minority business community should not even look to the subcontracting arena at all...especially with the new definition of commercial items.

If the opportunity to participate in the federal marketplace is virtually eliminated for minority businesses, I dare say their very existence is threatened. To deprive any group of individuals the opportunity to establish an economic base, especially those groups who will be in the majority within the next decade, is the same as dooming this country to failure in the business arena of the future.

This is the reason why organizations such as MBELDEF must actively fight any attempts to dismantle the very fiber of this country.

In March of 1993, MBELDEF scored a historic victory in the District of Columbia Court of Appeals on behalf of small and minority businesses. The Court ruled that PEPCO had violated the Small Business Act by flatly refusing over a period of 12 years, to submit contracting plans outlining how it planned to utilize minority and women owned businesses.

The District of Columbia's Public Service Commission in 1990 ruled that PEPCO was required as a federal contractor to submit a subcontracting plan to the federal government outlining how it planned to utilize minority businesses.

Mr. Chairman, you may be interested in noting that MBELDEF had the opportunity to monitor a case initiated by the Public Service Commission of Nevada. The Nevada Commission opened a case entitled In Re- investigation by the Public Service Commission to Determine whether or not and to what extent Section 211 of Public Law 95-507 applies to Nevada Investor Owned Public Utilities. In an unprecedented ruling, the Nevada Commission ruled in part that all investor owned utilities within

the Commission's Jurisdiction should append to each annual report information relating to the nature of its minority and women owned business subcontracting practices.

If S. 1587 as it is currently proposed was enacted, both of these victories would never have taken place.

To quote our Founder and Chairman, the Honorable Parren J. Mitchell, "Corporations who do substantial business with the federal government must realize that engaging in minority contracting is not only good for this country and the minority business person, it is also the requirement of the laws of this Country."

In closing, we caution those Legislators who would attempt to abolish the few inroads, that so many have fought for before them.

Thank you for this opportunity to have our voice heard, I will take any questions you may have of me.

STATEMENT
OF
AMY J. MILLMAN
NATIONAL WOMEN'S BUSINESS COUNCIL

before

Subcommittee on Procurement, Taxation and Tourism

Committee on Small Business
United States House of Representatives

Hearings on Procurement Reform

February 2, 1994

My name is Amy J. Millman. I am the Executive Director of the National Women's Business Council. The Council is delighted to be invited to comment on the bills before you, H.R. 2238 and H.R. 3586, the leading House proposals on comprehensive procurement reform. We would also like to comment on another bill, H.R. 2357, the Women's Business Procurement Assistance Act of 1993, introduced by Chairman LaFalce, along with members of this committee and other House colleagues. We fully support the objectives of comprehensive reform of the federal procurement system and wish to share with you our views on these bills. In the spirit with which the Chairman's bill, HR 2357, was introduced last year, we would also like to offer recommendations regarding certain improvements and clarifications which should be incorporated into the language of any procurement reform bill.

In early 1993, Mary Ann Campbell, a certified financial planner from Little Rock, Arkansas and President Clinton's choice as Chair of our Council, met with SBA Administrator and NWBC Council member Erskine Bowles to discuss the Council's agenda for this Congress. It was recommended that the Council identify "measurable goals" which could be accomplished within a limited time frame and with scarce resources - a task entrepreneurs are faced with every day of their lives. With input from a broad circle of experts and women entrepreneurs, the Council developed its strategic action plan. What emerged as a top priority was increased access to business opportunities both in the public and private sectors.

Another priority identified in this plan was to get the word out about the unprecedented growth in the sheer numbers of women-owned businesses being established in the last decade. Once the demographics were recognized by policy makers, the Council was confident that efforts to improve access to business opportunities would result.

The 1987 Census reported that 4.1 million women-owned businesses operating as sole proprietorships, partnerships, and Sub S corporations exist in the economy.¹ This represented a 57.4

¹ A December 1990 SBA Report, A Status Report to Congress: Statistical Information on Women in Business, estimates that approximately 95 % of the women-owned businesses fall in this category which excludes C corporations, but account for only 58.3% of sales. This, of course, confirms that government data which excludes the C corporations greatly understates the contributions to the economy of the women-owned business sector.

percent increase in the number of such businesses from 1982 to 1987, a rate of growth more than four times the rate for all businesses. In that five year period, total receipts for women-owned businesses nearly tripled -- rising to \$278.1 billion by 1987. More recently, a 1992 study conducted by the National Foundation for Women Business Ownership (NFWBO) estimates that there are now 6.5 million women-owned businesses, a count reflecting both the inclusion of women-owned C-corporations (a group previously not identified in census data) and growth in this sector since the 1987 census. That same study estimates that these women-owned businesses employ more workers than the Fortune 500. We are anxiously awaiting the tabulations of the 1992 census which should be available in early 1995. It is already clear to us that the data will support the trends identified by the Foundation.

Congress has directed the National Women's Business Council to report to Congress and the President with recommendations on what changes are necessary to assure the success of women's business enterprise in this country. We have a simple message to deliver today. As evidenced in the many bills passed by Congress in the last five or so years, it has been the intent of this body to direct the government to balance its need for streamlined procurement with an important socio-economic concern--insuring that small businesses, minority-owned businesses and women-owned businesses are not shut out of the market. That balance must not

be lost in this current rush to reform. Recent studies have shown that winning federal government contracts greatly increases the chances for a firm's survival. The stakes for federal small business contractors, specifically women-owned businesses are high.

COUNCIL RECOMMENDATIONS

The Council believes that the current reform proposals should contain the following:

- * the expansion of small business access to federal procurement contracts and subcontracts, including increases in the small purchase threshold to \$100,000 and linked to electronic contracting and reserved for small businesses.
- * mandatory prime and subcontracting goals for women (which do not reduce or compete with minority set-asides or goals) for federal contracting and for all recipients of federal funding.
- * effective measures, built into the system to increase real access for women business owners to federal contracts and subcontracts, including a pilot program involving an aggressive outreach effort to identify women contractors to bid on contracts in certain targeted agencies.

SMALL BUSINESS INITIATIVES

Many, but not all women-owned businesses, qualify as small businesses. Efforts to assist small business generally, of course, assist small women-owned businesses as well. It is for this reason that we support the provisions in the pending bills to increase the small purchase threshold, streamline the procurement process, and institutionalize the use of electronic

commerce. We are particularly excited about the Electronic Data Interchange program and believe that it is very important that this Interchange include both electronic notice and electronic bidding. It is also very important that the data base be compatible from agency to agency and from procurement center to procurement center. The recent pilot program undertaken at Wright-Patterson Air Force base has shown a dramatic success in increasing awards to small business and, most notably, **a sharp increase in the contracts awarded to women-owned businesses.** The Wright-Patterson system has enabled that base to exceed the DoD small business goals and at the same time save the government money. These results prove to us that an open and streamlined system of contracting frees up procurement officials to spend time generating bids and promoting competition.

PRIME AND SUBCONTRACTING GOALS

The Council believes that this round of procurement reform should include Congressionally-mandated contracting and subcontracting goals for women-owned businesses. After more than a decade of voluntary Executive Branch goal-setting, a recent study prepared for the SBA concludes that only where there have been legislated preferences have women-owned businesses made substantial gains. This reality and the knowledge of the growth in the numbers of women-owned businesses as a percentage of the small business community, lead one to conclude that the barriers to access for this sector are structurally ingrained in the current system.

In May 1979, President Carter signed Executive Order 12138, mandating affirmative action by federal departments and agencies "to facilitate, preserve and strengthen women's business enterprise and to ensure full participation by women in the free enterprise system." In the years since that original executive order was signed, the Small Business Administration has worked to increase the participation of women-owned business in federal contracting by negotiating contracting and, most recently, subcontracting goals with government agencies. The efforts to date, with a few exceptions, have produced some, but not substantial, change. And today, more than a decade later, the numbers of contract awards to women are uninspiring. Anecdotal data collected both by the National Association of Women Business Owners and the National Women's Business Council still ring with stories of women-owned businesses having to hire male contracting officers to negotiate with contracting officials of the federal government.

We know that there are sufficient numbers of women business owners eager to do business with the federal government but are frustrated at every turn. This system is not accommodating them, a fact clearly exhibited in the procurement goals and award data which Congress directed the Executive branch to collect. Women-owned businesses continue to be under-represented in the federal market. In fiscal year 1992, only 1.6 percent of all federal

procurement dollars are awarded to women-owned businesses.

Preliminary data on FY 1993 awards show little improvement.

Any improvement in the women's share of contract dollars has come as a result of deliberate Congressional intervention. Since 1987, Congress has expressed itself repeatedly on this issue. The following statutes direct certain agency programs to target women-owned businesses for contracting opportunities.

- * The Surface Transportation and Uniform Relocation Assistance Act of 1987 and the Airport and Airway Safety and Capacity Expansion Act of 1987. These acts required that not less than 10 percent of federal assistance grant dollars provided to state and local agencies to finance highway, urban mass transit, and airport projects must be disbursed to disadvantaged business enterprises. Women are included in the definition.
- * The appropriations for the Department of Energy and the Agency for International Development for fiscal years 1991 and 1992 contained 10 percent goals contracting with groups, including socially and economically disadvantaged groups. Here too, the definitions expressly include women.
- * The Environmental Protection Agency has two legislatively mandated procurement requirements that include women-owned small businesses among the targeted groups.
 - The 1990 Amendments to the Clean Air Act require the EPA to the extent practicable, to see that not less than 10 percent of total federal funding be made available to concerns owned by socially and economically disadvantaged individuals, including women.
 - The EPA's 1991 appropriation act required EPA to ensure that at least 8 percent of federal funding for prime contracts and subcontracts awarded in support of authorized programs go to similar groups, again including women.
- * P. L. 101-144 tasked the National Aeronautics and Space Agency with a goal of 8 percent of the total value of prime contracts and subcontracts to be awarded to socially and

economically disadvantaged firms, which includes women-owned businesses.

- * P. L. 102-233 obligated the Resolution Trust Corporation (RTC) to provide additional incentives to minority- or women-owned firms by awarding any such business an additional 10 percent of the total technical points and an additional 5 percent of the total cost preference points achievable in the rating process.
- * In P. L. 100-656, Congress has also mandated that data be collected on prime contracting and subcontracting to women-owned businesses. Tables showing that data are attached to this testimony.

Much of the stimulus for these legislative proposals occurred because of the efforts of the Small Business Committee which conducted extensive hearings in the spring of 1988 on women-owned businesses' contributions to the economy. As a result of the hearings, the Committee issued a comprehensive report, New Economic Realities: The Rise of Women Entrepreneurs, and led the effort to pass H.R. 5050, the Women's Business Ownership Act of 1988, the same act which established this Council. Through the leadership of the House Small Business Committee, the Congress has focused attention on the potential of women-owned businesses to make significant contributions to the economy, as a whole, and to the efficient workings of the federal government. The recent legislation actions clearly demonstrate Congress' recognition that removing barriers to the participation of women-owned businesses in the procurement arena is an important socio-economic policy for our country.

One of the catalysts for overall reform of the procurement system has been the Report of the Acquisition Law Advisory Panel (the "Section 800" Panel). The Final Report of the Section 800

Panel contains a clear commitment to maintaining the balance "between an efficient process and socio-economic policies." The Panel Report urged that each socio-economic program created by Congress should be implemented to the greatest extent consistent with reasonably efficient procurement procedures.

However, despite this Congressional action to establish goals for contracting with women-owned business and despite the Panel report recommending that such socio-economic programs and policies should continue, the current major proposals on procurement reform appear to neglect women-owned businesses almost entirely. We believe that the current legislation fails to acknowledge adequately Congress' commitment to women-owned businesses. The bills do not directly refer to women-owned businesses in their discussion of the socio-economic programs to be continued and expanded across the government. It is not clear whether this is deliberate, an oversight or an assumption that women-owned businesses are included. Whatever, the reason, before the process goes any further, the Council believes that the legislation must be clarified to make it crystal clear that women-owned businesses are included. Specifically, the Council recommends the following provisions, many of which are drawn from H. R. 2357:

- * Congressional creation of a separate numerical goal for contracting and subcontracting to women-owned businesses, to be added (1) to Section 39004 of the November 16, 1993 proposed Amendment to H.R. 3400, (2) Section 15 (g) of the Small Business, and (3) to Section 1207 of P.L. 99-661 which should be expanded to cover civilian as well as defense agencies.

- * As it does for socially and disadvantaged businesses, the legislation should clarify that it is not intended to amend, modify, or supersede the current statutes which do specifically cover women in the setting of goals.
- * The current requirements for prime contractors to have subcontracting plans, including Section 8(d) of the Small Business Act, should be retained and expanded to include women-owned businesses.
- * The RTC requirement which designates that when reviewing and evaluating proposals for the award of contracts, additional incentives must be provided for minority- or women-owned businesses should be extended to all civilian and defense procurement.
- * Continue strong support for the 8(a) program which in benefitting minority women-owned businesses.

Increasing the access of women-business owners to federal procurement is not only good for the women-business owners; it is good for the economy. In its landmark hearings that led to the enactment of H.R. 5050, this Committee concluded that it was not only good socio-economic policy to have the government act in ways which increase access for women-owned businesses to federal procurement, but it was good economic policy. Transmitting its report, this Committee concluded:

It is impossible to overestimate the social and economic importance of this new economic reality....Women-owned businesses may provide the cutting edge--and the American advantage--in the worldwide economic competitiveness fast upon us. The loss to the Nation would be incalculable were public policy makers not to foster this development to the fullest extent possible.

The National Women's Business Council is concerned that none of the proposals before you today -- not H.R. 2238, not H.R. 3586, not the National Procurement Review paper, -- go far enough to really improve the opportunities for women-owned businesses in the federal market place. While the future holds great promise

once the reforms are fully implemented, without changes to the status quo during the transition period, no federal agency or prime contractor will have reason to change the way they do business and seek out women-owned businesses.

ADDITIONAL MEASURES TO CHANGE THE STATUS QUO

Pilot Project: Goals alone are not enough. They are the beginning of the process. The evidence compiled by the SBA's Office of Women's Business Ownership suggests that agencies that have a commitment from the top and a person dedicated to outreach to women-owned businesses have produced significant increases in actual contract awards.

For this reason, the Council recommends that a pilot study be included in any procurement reform legislation. This pilot study would target three agencies, HHS, EPA, and GSA, for identification of intensive outreach/contract award initiatives which really work to reach women-owned businesses. One aspect of the study would be the affirmative designation of women-in-business specialists in the targeted agencies to work with the SBA's Office of Women Business Ownership to develop, administer and evaluate pilot program initiatives. These agencies were selected because of their level of contract dollars and the commitment of senior officials in these agencies to promote access of women-owned businesses.

Standard Definition: The Council recommends that the government use a single uniform definition of women-owned business for

procurement purposes and continue efforts begun in the Department of Transportation to effect a single definition for use by states and localities receiving DOT funds. Attached to our testimony is a definition developed by the Council.

In hearings conducted by the Council in Denver, Colorado and Arlington, Texas on women-owned businesses' experiences in high technology, women business owners talked of their frustration in identifying and qualifying for government set-asides and incentives to small and disadvantaged businesses. Even federal agencies are not consistent in their definitions, and each state develops its own guidelines. We believe that the federal government must set a standard for procurement purposes. The standard developed should also apply to federal data collection efforts. As you are undoubtedly aware, for example, Census information is collected using one definition and procurement statutes and procedures use another.

The Council also endorses several proposals which appear in the procurement bills before you.

- * Designate women-in-business specialists in all agencies (H.R. 2357) to work closely with the SBA Office of Women's Business Ownership.
- * Impose obligation on all procurement officials to engage in affirmative action to identify and solicit offers from small businesses owned and controlled by women or by socially and economically disadvantaged individuals. (H.R. 2357).
- * Congressionally mandate establishment of the Office of Women's Business Ownership in the SBA (H.R. 2357).
- * Obligate the Director of Federal Procurement Policy to develop policies to ensure that small businesses owned and

controlled by women or by socially and economically disadvantaged individuals are provided with "Maximum practicable opportunities" to contract and subcontract. (Section 503(d) of H.R. 2238 and Section 34001 of the Amendments to H.R. 3400).

- * Require a study and report by the Director for Federal Procurement Policy, the GAO or the Comptroller General on progress to insure that the number of small businesses owned and controlled by women or by socially and economically disadvantaged individuals receiving federal contracts and subcontracts increases significantly. (H.R. 2357 and Section 34001 and 39003 of the Amendments to H.R. 3400).
- * Make effectiveness in outreach to small businesses owned and controlled by women or by socially and economically disadvantaged individuals one of the elements of the performance evaluation of government contracting officers (Section 39004 of the Amendments to H.R. 3400).

In closing we might note that a review of the current comprehensive procurement reform bills reveals but a single place where women-owned businesses are mentioned, in Section 39005 of the Amendments to H.R. 3400 which establishes education and training programs to increase the participation of women-owned businesses, as well as businesses owned by socially and economically disadvantaged individuals and other minorities. While we appreciate the gesture, that simple provision does nothing to bring about the change we seek. We appreciate the opportunity to appear here today and look forward to working with you and the members of the other Committees of the House and Senate as these bills progress through Congress.

RECOMMENDATION #1***A Standard Definition of
"Woman-Owned" Business***

There is currently no standard definition of "woman-owned" business for federal government usage. The NWBC recommends the following wording for all federal government purposes. (Please note that the SBA is currently promulgating regulations along these lines.)

DEFINITION

A woman-owned business is a business concern with at least 51 percent unconditional ownership and control by a woman or women. Such unconditional ownership must be reflected in the concern's ownership agreement; and the woman, or women, must manage and operate the business on a daily basis.

JOINT VENTURE AGREEMENTS

A woman-owned business must control the performance of the contract awarded to the joint venture for the venture to qualify as a woman-owned business.

SUBCONTRACTING

A business concern shall not be qualified as a woman-owned business unless it meets the criteria mentioned above and it controls a significant portion of its contract with its own facilities and personnel.

CONTROL AND MANAGEMENT

An applicant concern's management and daily business operations must be controlled by a woman or women. An applicant concern must be managed on a full-time basis by one or more women. The U.S. Small Business Administration will consider, on a case-by-case basis, the actual management involvement of women in the applicant concern. A woman must hold the highest ranking in the organization.

The woman or women shall control the Board of Directors of the applicant concern, either in actual numbers of voting directors or through weighted voting. Men may be involved in the management of an applicant concern, and may be stockholders, partners, officers, and/or directors of such concern. However, these men may not exercise actual control or have the power to control the applicant concern.



January 26, 1994

VIA OVERNIGHT DELIVERY

Subcommittee on Procurement, Taxation and Tourism
Small Business Committee
E 363
Rayburn House Office Building
Washington, D.C. 20515

H. R. 3586 - Defense Acquisition

Gentlepeople:

I request the opportunity to testify at your February 2 hearing regarding Defense acquisition.

We are a small business whose products are sold to the Department of Defense, other government agencies and the private sector. I am also the Chairman of the Government Affairs Committee of the National Electrical Manufacturers Association Lighting Controls Council.

The testimony which I would like to present relates to a GSA contract application procedure which has created an unnecessary barrier to reputable manufacturer participation in the Federal purchasing process. A statement of the problem and a recommended solution is attached.

Please arrange for someone to contact me regarding my request to appear before the Committee.

Sincerely,

A handwritten signature in dark ink, appearing to read "James Himonas", is written over a horizontal line.

James Himonas
President

JH:pk

Enclosure

COMMENTS RELATED TO H.R. 3586
and
AN APPEAL TO REVISE GSA FEDERAL SUPPLY SCHEDULE
CONTRACT APPLICATIONS

January 26, 1994

THE ISSUE:

A GSA Federal Supply Schedule Contract can be a valuable aid to small businesses. GSA contract provisions require, however, the revelation of critical business intelligence. The disclosure of this information can jeopardize the market position and existence of reliable but small vendors.

RECOMMENDATION:

Change the GSA commerciality verification procedures for products offered to the Federal Government. (Commerciality exists when less than half of a company's sales are to the Federal Government.)

THE SITUATION:

1. The GSA is required by the Federal Acquisition Regulations to prove commerciality of a company's products.
2. The GSA forms format requires that vendors reveal total sales of each product sold to the Federal Government and total sales of the same products sold to all other customers.
3. FAR does not require revelation of total commercial sales. Paragraph 15.804-3(f) (2) indicates that sales to the general public are normally regarded as substantial if they "comprise at least 55% of total sales of the item."
4. The GSA right to know sales volume is justified only to the extent to prove that private sector sales exceed federal government purchases by the amount required by FAR.
5. Disclosure of exact, total sales by model number creates a significant risk to the life of a business.
6. Product sales data in the highly competitive technical fields are extremely valuable to competitors, especially large ones.



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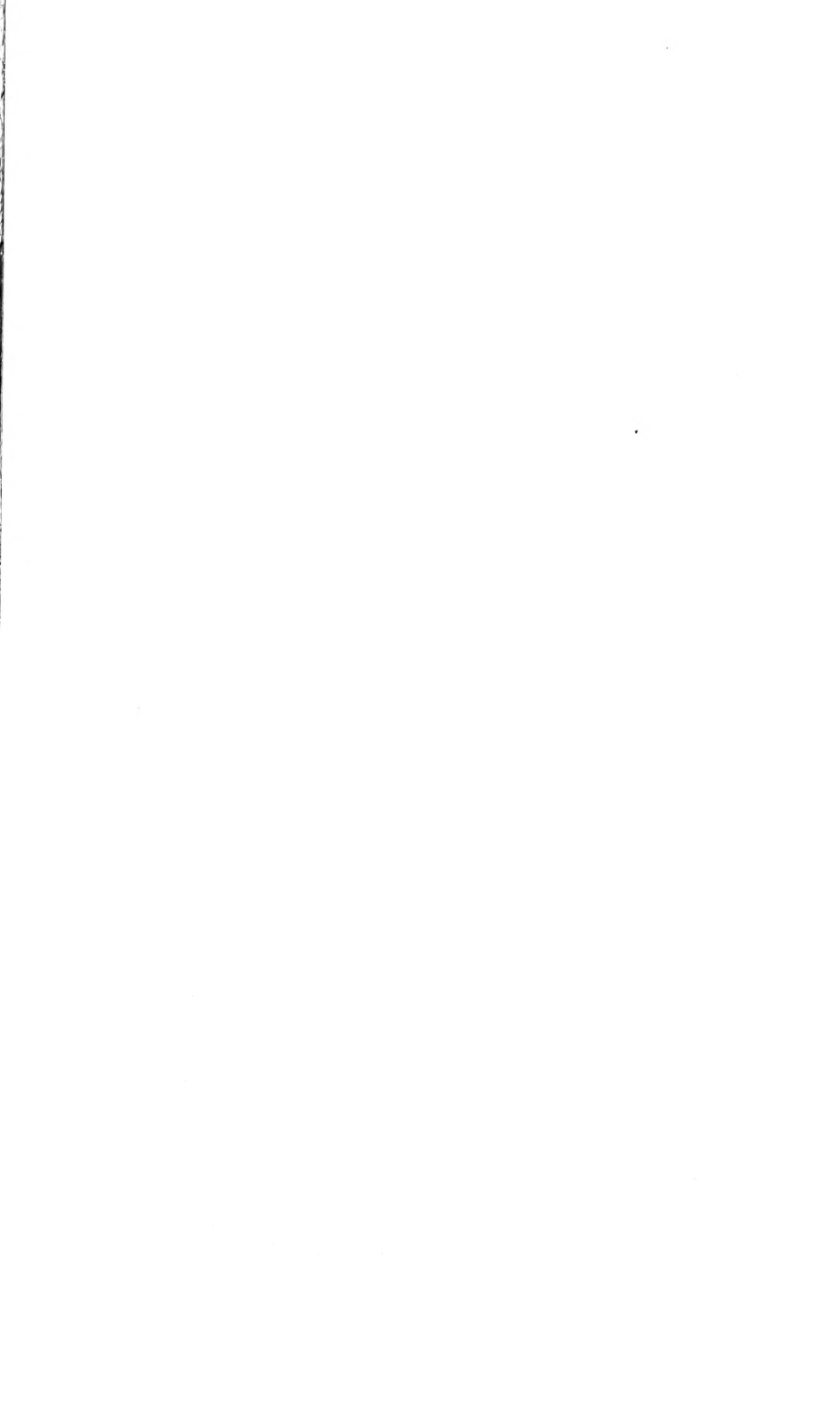
7. The GSA cannot guarantee that the numerous government people who see contract offers will maintain total secrecy of business intelligence or be restricted from accepting employment in private industry. Incidents involving companies which bribed government employees to obtain secret contract information have been fully reported in the press and are well known to GSA.
8. The Federal Government is losing access to quality, competitively priced products because small and medium size vendors are reluctant to reveal unnecessary business intelligence which can result in serious damage to them.

PROPOSAL FOR ALTERNATE METHOD:

The commerciality of a company's products can be established in numerous ways without revealing total item sales. Some of the alternatives are:

1. A certification by a company of a minimum level of sales achieved for proof of commerciality. (The present method is only a certification, anyway. It is done by filling out a form.)
2. Submission of a sampling of invoices to commercial customers, which total more than sales to the Federal Government.
3. Submission of trade publication articles and case studies, verified by commercial customers, which indicate purchases.





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